DOCKET

No. 08-7412

Title:	Terrance Jamar Graham, Petitioner
	v.
	Florida
Docketed:	November 26, 2008
Lower Ct:	District Court of Appeal of Florida, First District
Case Nos.:	(1D06-3190)
Decision Date:	April 10, 2008
Rehearing Denied:	May 16, 2008
Discretionary Court Decision Date:	August 22, 2008

Questions Presented

Date	Proceedings and Orders
Nov 20 2008	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due December 29, 2008)
Dec 1 2008	Waiver of right of respondent Florida to respond filed.
Dec 11 2008	DISTRIBUTED for Conference of January 9, 2009.
Dec 15 2008	Response Requested . (Due January 14, 2009)
Jan 22 2009	Order extending time to file response to petition to and including February 13, 2009.
Feb 3 2009	Brief of respondent Florida in opposition filed.
Feb 19 2009	DISTRIBUTED for Conference of March 6, 2009.
Apr 2 2009	DISTRIBUTED for Conference of April 17, 2009.
Apr 20 2009	DISTRIBUTED for Conference of April 24, 2009.
Apr 27 2009	DISTRIBUTED for Conference of May 1, 2009.
May 4 2009	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
May 20 2009	Motion to appoint counsel filed by petitioner Terrance Jamar Gr (CL Page 162)
Jun 3 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including July 16, 2009.
Jun 3 2009	The time within which to file respondent's brief on the merits is extended to and including September 14, 2009.
Jun 17 2009	Motion DISTRIBUTED for Conference of September 29, 2009.
Jul 7 2009	Consent to the filing of amicus briefs, in the support of either party or of neither party, received from counsel for the respondent. VIDED.
Jul 16 2009	Joint appendix filed (three volumes with motion to seal no. III.) (Statement of costs received).
Jul 16 2009	Brief of petitioner Terrance Jamar Graham filed.
Jul 20 2009	Motion for leave to file Volume III of the joint appendix under seal filed by petitioner Terrance Jamar Graham.
Jul 22 2009	Brief amici curiae of Amnesty International, et al. filed. VIDED.
Jul 23 2009	Brief amicus curiae of American Bar Association filed. VIDED.
Jul 23 2009	Brief amicus curiae of Disability Rights Legal Center filed. VIDED.
Jul 23 2009	Brief amici curiae of NAACP Legal Defense & Educational Fund, Inc., et al. filed. VIDED.
Jul 23 2009	Brief amici curiae of Former Juvenile Offenders Charles S. Dutton, et al. filed. VIDED.

Jul 23 2009	Brief amicus curiae of The Sentencing Project filed. VIDED.
Jul 23 2009	Brief amici curiae of Educators, et al. filed. VIDED.
Jul 23 2009	Brief amici curiae of American Association of Jewish Lawyers and Jurists, et al. filed. VIDED.
Jul 23 2009	Brief amicus curiae of Center on Administration of Criminal Law filed. VIDED.
Jul 23 2009	Brief amici curiae of Council of Juvenile Correctional Administrators, et al. filed. VIDED.
Jul 23 2009	Brief amici curiae of Mothers Against Murderers Association, et al. filed. VIDED.
Jul 23 2009	Brief amici curiae of J. Lawrence Aber, et al. filed. VIDED.
Jul 23 2009	Brief amici curiae of American Psychological Association, et al. filed. VIDED.
Jul 23 2009	Brief amici curiae of American Medical Association, et al. in support of neither party filed. VIDED.
Jul 23 2009	Brief amici curiae of Juvenile Law Center, et al. filed. VIDED.
Aug 17 2009	SET FOR ARGUMENT ON Monday, November 9, 2009
Aug 17 2009	CIRCULATED.
Sep 4 2009	Motion for leave to file Volume III of the joint appendix under seal GRANTED.
Sep 10 2009	Record received from District Court of Appeals of Florida, 1st District. (1 box)
Sep 14 2009	Brief of respondent Florida filed. (Distributed)
Sep 18 2009	Brief amici curiae of Solidarity Center for Law and Justice, P.C., et al. filed. VIDED. (Distributed)
Sep 21 2009	Brief amicus curiae of Center for Constitutional Jurisprudence filed. VIDED. (Distributed)
Sep 21 2009	Brief amici curiae of Sixteen Members of the United States House of Representatives filed. VIDED. (Distributed)
Sep 21 2009	Brief amicus curiae of National District Attorneys Association filed. VIDED. (Distributed)
Sep 21 2009	Brief amici curiae of National Organization of Victims of Juvenile Lifers, et al. filed. VIDED. (Distributed)
Sep 21 2009	Brief amici curiae of Louisiana, et al. filed. VIDED. (Distributed)
Sep 21 2009	Brief amicus curiae of Criminal Justice Legal Foundation filed. VIDED. (Distributed)
Oct 5 2009	Motion to appoint counsel filed by petitioner GRANTED. Bryan S. Gowdy, Esquire, of Jacksonville, Florida, is appointed to serve as counsel for the petitioner in this case.
Oct 14 2009	Reply of petitioner Terrance Jamar Graham filed. (Distributed)
Nov 9 2009	Argued. For petitioner: Bryan S. Gowdy, Jacksonville, Fla. (Appointed by this Court.) For respondent: Scott D. Makar, Solicitor General, Tallahassee, Fla.

Name	Address	Phone
Attorneys for Petitioner:		
Bryan S. Gowdy Counsel of Record	Mills Creed & Gowdy, P. A. 865 May Street Jacksonville, FL 32204 bgowdy@appellate-firm.com	(904)-350-0075

Party name: Terrance Jamar Graham

John S. Mills	Mills Creed & Gowdy, P.A. 865 May Street Jacksonville, FL 32204	(904) 350-0075

Party name: Terrance Jamar Graham

Attorneys for Respondent:

Scott D. Makar Counsel of Record	Solicitor General Office of the Attorney General The Capitol - PL- 01 Tallahassee, FL 32399 scott.makar@myfloridalegal.com	(850) 414-3681

Party name: Florida

Edward C. Hill Jr.	Special Counsel Criminal Appeals Office of the Attorney General PL-01 The Capitol Tallahassee, FL 32399-1050	(850) 414-3300

Party name: Florida

Other:

Anthony T. Caso	Law Office of Anthony T. Caso 8001 Folsom Blvd., Suite 100 Sacramento, CA 95826	(916) 386-4432

Party name: Center for Constitutional Jurisprudence

Constance De la Vega	University of San Francisco School of Law Center for Law and Justice 2130 Fulton Street San Francisco, CA 94117	(415) 422-2296

Party name: Amnesty International, et al.

Michael B. de Leeuw	Fried Frank Harris Shriver & Jacobson LLP One New York Plaza New York, NY 10004	(212) 859-8000

Party name: American Association of Jewish Lawyers and Jurists, et al.

David W. DeBruin	Jenner & Block LLP 1099 New York Avenue, N.W. Suite 900 Washington, DC 20001-4412 ddebruin@jenner.com	(202) 639-6000

Party name: Former Juvenile Offenders Charles S. Dutton, et al.

S. Kyle Duncan	Appellate Chief Louisiana Department of Justice P.O. Box 94005 Baton Rouge, LA 94005	(225) 326-6765

Party name: Louisiana, et al.

Michael P. Farris	Patrick Henry College One Patrick Henry Circle Purcellville, VA 20132	(540) 338-8712

Party name: Sixteen Members of the United States House of Representatives

John J. Gibbons	Gibbons PC One Gateway Center Newark, NJ 07102	(973) 596-4500

Party name: Educators, et al.

Shannon Lee Goessling	Southeastern Legal Foundation, Inc. 6100 Lake Forrest Drive, N. W. Suite 520 Atlanta, GA 30328	(404) 257-9667

Party name: National Organization of Victims of Juvenile Lifers, et al.

Corrine A. Irish	Holland & Knight LLP 195 Broadway, 24th Floor New York, NY 10007 corrine.irish@hklaw.com	(212) 513-3200

Party name: Council of Juvenile Correctional Administrators, et al.

James Patrick Kelly	Solidarity Center for Law and Justice, P.C. Five Concourse Pkwy., Suite 200 Atlanta, GA 30328	(678) 231-1209

Party name: Solidarity Center for Law and Justice, P.C., et al.

Michelle Teresa Leighton	University of San Francisco School of Law 2130 Fulton St. San Francisco, CA 94117 mleighton@usfca.edu	(415) 422-3330

Party name: Amnesty International, et al.

Marsha L. Levick	Juvenile Law Center 1315 Walnut Street Suite 400 Philadelphia, PA 19107	(215) 625-0551

Party name: Juvenile Law Center, et al.

Stephen M. Nickelsburg	Clifford Chance US LLP 2001 K Street, NW Washington, DC 20006-1001	(202) 912-5000

Party name: J. Lawrence Aber, et al.

Shannon M. Pazur	O'Melveny & Myers 1625 Eye Street, NW Washington, DC 20006	(202)-383-5300

Party name: The Sentencing Project

E. Joshua Rosenkranz	Orrick, Herrington & Sutcliffe, LLP 666 Fifth Avenue New York, NY 10103-0001 jrosenkranz@orrick.com	(212) 506-5000

Party name: American Medical Association, et al.

Gene C. Schaerr	Winston & Strawn LLP 1700 K Street, N.W. Washington, DC 20006 gschaerr@winston.com	(202) 282-5845

Party name: National District Attorneys Association

Kent S. Scheidegger	Criminal Justice Legal Foundation 2131 L Street Sacramento, CA 95816 cjlf@cjlf.org	(916) 446-0345

Party name: Criminal Justice Legal Foundation

Neil Michael Soltman	Mayer, Brown 350 South Grand Ave. Los Angeles, CA 90071	(213) 229-9500

Party name: Disability Rights Legal Center

Vincent Michael Southerland	99 Hudson Street, Suite 1600 New York, NY 10013	(212)-965-2260

vsoutherland@naacpldf.org
Party name: NAACP Legal Defense & Educational Fund, Inc., et al.

Danielle Mary Spinelli
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000
Party name: American Psychological Association, et al.

Angela C. Vigil
Baker & McKenzie LLP
1111 Brickell Avenue, Suite 1700
Miami, FL 33131
(305) 789-8904
Party name: Mothers Against Murderers Association, et al.

H. Thomas Wells Jr.
President
American Bar Association
321 N. Clark Street
Chicago, IL 60654
(312) 988-5000
Party name: American Bar Association

Richard K. Willard
Steptoe & Johnson LLP
1330 Connecticut Avenue
Washington, DC 20036
(202) 429-3000
Party name: Center on Administration of Criminal Law

PETITION FOR WRIT OF CERTIORARI

(27)

No. 08-7412

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2008

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari
to the District Court of Appeal, First District, State of Florida

---

PETITION FOR A WRIT OF CERTIORARI

John S. Mills
Counsel of Record
Bryan S. Gowdy
Mills Creed & Gowdy, P.A.
865 May Street
Jacksonville, Florida 32204
(904) 350-0075

Counsel for Petitioner

QUESTION PRESENTED

Whether the Eighth Amendment's ban on cruel and unusual punishments prohibits the imprisonment of a juvenile for life without the possibility of parole as punishment for the juvenile's commission of a non-homicide.

LIST OF PARTIES IN PROCEEDING BELOW

1. Terrance Jamar Graham, Appellant

2. State of Florida, Appellee

TABLE OF CONTENTS

Question Presented i

List of Parties in Proceeding Below ii

Table of Contents iii

Table of Citations iv

Opinions Below 1

Jurisdiction 1

Constitutional Provisions Involved 1

Statement of the Case 2

Reasons for Granting the Writ 4

APPENDICES

Opinion of the First District Court of Appeal, Florida ..... APP 1

Order of the First District Court of Appeal, Florida ..... APP 23
Denying Motion for Rehearing, Clarification and
Certification

Motion to Correct Sentencing Error and Illegal Sentence ..... APP 24
Pursuant to Fla. R. Crim. P. 3.800(b)(2) filed in the
Circuit Court, Fourth Judicial Circuit, in and for Duval
County, Florida

Memorandum of Law in Support of Motion to Correct ..... APP 28
Sentencing Error and Illegal Sentence Pursuant to Fla.
R. Crim. P. 3.800(b)(2) filed in the Circuit Court, Fourth
Judicial Circuit, in and for Duval County, Florida

Initial Brief filed in the First District Court of Appeal, ... APP 57
Florida

Motion for Rehearing, Clarification and for Certification of Question of Great Public Importance filed in the First District Court of Appeal, Florida ..... APP 95

Order of the First District Court of Appeal, Florida Issuing Certificate of Indigency to Supreme Court of Florida ..... APP 104

Notice to Invoke Discretionary Jurisdiction of Supreme Court of Florida ..... APP 105

Denial of Petition for Review by Supreme Court of Florida ..... APP 107

TABLE OF CITATIONS

CASES

Brennan v. State, 754 So. 2d 1 (Fla. 1999) 8-9

Graham v. State, 982 So. 2d 43 (Fla. Dist. Ct. App. 2008) 1, 3

Kennedy v. Louisiana, __ U.S. ___, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008) 6, 8

Naovarath v. State, 779 P.2d 944 (Nev. 1989) 7

People v. Dillon, 668 P.2d 697 (Cal. 1983) 7

People v. Launsburry, 551 N.W.2d 460 (Mich Ct. App. 1996) 8

People v. Miller, 781 N.E.2d 300 (Ill. 2002) 7

Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) ..... *passim*

State v. Jensen, 579 N.W.2d 613 (S.D. 1998) 8

State v. Walker, 843 P.2d 203 (Kan. 1992) 8

Thompson v. Oklahoma, 487 U.S. 815, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988) 4

Workman v. Commonwealth, 429 S.W.2d 374 (Ky. Ct. App. 1968) 7

STATUTES and RULES

28 U.S.C. § 1257(a) 1

Fla. R. Crim. P. 3.800(b) 3

Sup. Ct. R. 13.1 & 29.2 1

OTHER AUTHORITY

United Nations Convention on Rights of Child, art. 37(a), November 20, 1989, U.N. Doc. A/44/736, 28 I.L.M. 1456 ..... 5, 6

Elizabeth Cepparulo, Article, *Roper v. Simmons: Unveiling Juvenile Purgatory: Is Life Really Better than Death?*, 16 Temp. Pol. & Civ. Rts. L. Rev. 225 (Fall 2006) 8

Human Rights Watch/Amnesty Int'l, *The Rest of their Lives: Life Without Parole for Child Offenders in the United States* (2005) ..... *passim*

OPINIONS BELOW

The opinion and judgment of the First District Court of Appeal of Florida (APP 1-22) is reported at *Graham v. State*, 982 So. 2d 43 (Fla. Dist. Ct. App. 2008). The First District Court of Appeal's order (APP 23) denying rehearing, clarification, and certification is unreported. The Supreme Court of Florida's order declining to accept jurisdiction (APP 107) is unreported.

JURISDICTION

The opinion and judgment of the First District Court of Appeal of Florida was entered on April 10, 2008. (APP 1.) The First District Court of Appeal denied Petitioner's timely motion for rehearing, clarification, and certification on May 16, 2008. (APP 23, 95-103.) The Supreme Court of Florida denied Petitioner's timely petition for review on August 22, 2008. (APP 105-107.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). Petitioner, who contemporaneously is filing a motion for leave to proceed *in forma pauperis*, is timely filing this petition for certiorari by U.S. Mail on November 20, 2008. *See* Sup. Ct. R. 13.1 & 29.2.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE[1]

At age sixteen, Petitioner was charged with armed burglary and attempted armed robbery. (APP 2.) Petitioner pled guilty. *Id.* This was Petitioner's first and only conviction of his life. The state trial court withheld adjudication and sentenced Petitioner to three years' probation. *Id.*

While he was still seventeen years old, the State alleged that Petitioner violated his probation. (APP 2, 17.) The State's most serious allegation was that Petitioner committed an armed home invasion robbery. (APP 2.) At the probation hearing, the State presented evidence that Petitioner held the victim at gunpoint, while his co-defendants robbed the home. *Id.* After his arrest, Petitioner was asked about similar robberies, and according to police officers, Petitioner admitted that he had been involved in two or three other robberies. *Id.* The state trial court found, by a preponderance of the evidence, that Petitioner had violated his probation. (APP 3.)

and sentenced him to life imprisonment without the possibility of parole. The trial court reasoned that the sentence was justified because it concluded that: (i) Petitioner had thrown away a great opportunity to do something with his life; (ii) nothing could be done to deter Petitioner from future criminal activity;

---

[1] Citations herein are to the single-volume 107-page appendix being submitted with this Petition. For example, "APP 1" refers to page 1 of the appendix.

(iii) Petitioner had decided to lead a criminal life; and (iv) the trial court needed to protect the community from Petitioner. (APP 3-4.)

After sentencing, Petitioner timely filed in the state trial court a motion and supporting memorandum of law under Rule 3.800(b) of the Florida Rules of Criminal Procedure. (APP 23-56.) This rule authorizes a defendant – before he prosecutes his direct appeal – to challenge in the trial court the legality of his sentence. Fla. R. Crim. P. 3.800(b). In the motion, Petitioner argued that "his sentence [was] in error and illegal under the Eighth Amendment of the U.S. Constitution" because "sentencing [Petitioner], a juvenile, to life in prison without parole for his first offense, a non-homicide, is cruel and unusual punishment." (APP 25.) The state trial court did not rule on Petitioner's motion within sixty days, and thus, it was deemed denied by operation of law. *See* Fla. R. Crim. P. 3.800(b)(2)(B).

On appeal before Florida's First District Court of Appeal, Petitioner argued that his life sentence without parole violated the Eighth Amendment's ban on cruel and unusual punishments. (APP 72-89.) In a twenty-two page opinion, the First District Court of Appeal thoroughly considered and rejected Petitioner's Eighth

Amendment argument.[2] (APP 1-22); *Graham v. State*, 982 So. 2d 43 (Fla. Dist. Ct. App. 2008). Petitioner moved for rehearing (APP 95), which was denied (APP 23). Petitioner then sought discretionary review in the Supreme Court of Florida (APP 105), which declined to accept jurisdiction (APP 107).

REASONS FOR GRANTING THE WRIT

This Court has recognized that the Eighth Amendment requires the States to treat juveniles differently than adults, at least in the context of the death penalty. *Roper v. Simmons*, 543 U.S. 551, 569-70, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005); *Thompson v. Oklahoma*, 487 U.S. 815, 834-35, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988) (plurality opinion). This is so because, given the differences between juveniles and adults, juveniles have a greater claim to be forgiven for their criminal misbehavior. *Roper*, 543 U.S. at 569-70. This Court should review this case to determine whether this different treatment of juveniles should be applied outside of the context of the death penalty. Specifically, this Court should determine whether this different treatment is warranted where a juvenile is sentenced to life in prison for committing a non-homicide (which, in this case, was the juvenile's first and only conviction).

---

[2]The First District Court of Appeal also considered whether Petitioner's sentence violated article I, section 17 of the Florida Constitution, a provision that, under Florida law, must be construed in conformity with the federal Eighth Amendment. (APP 4); *Graham v. State*, 982 So. 2d 43, 46 (Fla. Dist. Ct. App. 2008).

This Court, in particular, needs to review this case and address the question presented because – just as with the juvenile death penalty – virtually the entire international community has condemned this nation's practice of imprisoning juveniles for life without parole. In *Roper*, this Court relied heavily on international law to decide that the States could not constitutionally impose the death penalty on juvenile offenders. *Id.* at 575-79. As Justice Scalia noted in his *Roper* dissent, international standards prohibit imprisoning juveniles for life without parole. *Id.* at 623 (Scalia, J. dissent). According to a 2005 study, only fourteen nations, in theory, allow juveniles to be imprisoned for life without parole, and only three nations appear to do so in practice. Human Rights Watch/Amnesty Int'l, *The Rest of their Lives: Life Without Parole for Child Offenders in the United States* 105 (2005), *available at* http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf (last visited November 19, 2008). Outside the United States, the total number of persons serving life without parole for juvenile crimes was approximately a dozen, according to the 2005 study. *Id.* at 106. By comparison, as of 2004, the United States had 2225 such persons. *Id.* at 35, 124.

Imprisoning juveniles for life without parole is also inconsistent with standards of a widely-accepted international treaty relied upon by this Court in *Roper*. 543 U.S. at 576. Article 37(a) of the United Nations Convention on the Rights of the Child ("CRC") prohibits not only sentencing juveniles to death, but

also sentencing juveniles to "life imprisonment without the possibility of release." United Nations Convention on Rights of Child, art. 37(a), November 20, 1989, U.N. Doc. A/44/736, 28 I.L.M. 1456, 1470. The United States signed the CRC, but it and Somalia are the only two countries in the world that have not ratified the CRC. Human Rights Watch/Amnesty Int'l, *supra*, at 99 & nn. 292-93. Of the 192 nations that have ratified the CRC, only three nations registered reservations to Article 37(a), and only one of these reservations, by Malaysia, arguably diminishes Article 37(a)'s ban on imprisoning juveniles for life without parole. *Id.* 99 & n. 291. Simply put, the world community has overwhelmingly concluded that it is inhumane to imprison juveniles for life without any possibility of release.

Roper also relied on the "national consensus" in deciding the constitutionality of the juvenile death penalty. 543 U.S. at 565-69. Unlike the international consensus against juvenile life imprisonment without parole, the "national consensus" on this issue is not transparent. According to a 2005 study, forty-two states appear – at least in theory – to allow juvenile life imprisonment without parole for a wide variety of crimes. Human Rights Watch/Amnesty Int'l, *supra*, at 25. In *Roper*, however, this Court supported its decision based in part on the fact that the "practice" of executing juvenile offenders was "infrequent," even in the States where such a practice was legally permitted. 543 U.S. at 564-65; *see also Kennedy v. Louisiana*, __ U.S. ___, 128 S. Ct. 2641, 2657, 171 L. Ed. 2d 525

(2008) (noting that statistics on the actual number of executions, rather than legislation, may be a measure of national consensus). Similarly, the sentence of life imprisonment without parole is infrequently imposed where, as here, the juvenile has not committed a homicide. Specifically, according to the 2005 study, only seven percent of the 2225 juvenile offenders in the United States serving life sentences without parole were convicted of non-homicides. Human Rights Watch/Amnesty Int'l, *supra*, at 25, 124.

Another reason to grant certiorari is that the state courts have not agreed with one another. Some state courts, on federal or state constitutional grounds, have prohibited the imprisonment of a juvenile offender for life without the possibility of parole, for both homicide and non-homicide crimes. *See People v. Miller*, 781 N.E.2d 300, 302-308 (Ill. 2002) (holding that life sentence without parole against fifteen-year-old juvenile who committed multiple murders would violate Illinois's constitution); *Naovarath v. State*, 779 P.2d 944, 945-49 (Nev. 1989) (finding that life sentence without parole imposed on thirteen-year-old juvenile convicted of murdering his molester violated U.S. and Nevada constitutions); *Workman v. Commonwealth*, 429 S.W.2d 374, 377-78 (Ky. Ct. App. 1968) (holding life sentence without parole imposed on fourteen-year-old defendants convicted of rape was cruel and unusual punishment under Kentucky constitution); *People v. Dillon*, 668 P.2d 697, 726-27 (Cal. 1983) (reducing life

sentence imposed on seventeen-year-old convicted of felony murder as being cruel and unusual punishment). Other state courts, however, have upheld imprisoning juveniles for life without parole, for homicide and non-homicide crimes. *See, e.g., State v. Jensen*, 579 N.W.2d 613 (S.D. 1998) (holding that life imprisonment without the possibility of parole for a fourteen-year-old convicted of murder was not cruel and unusual punishment); *State v. Walker*, 843 P.2d 203, 213 (Kan. 1992)(approving life sentence for fourteen-year-old convicted of two aggravated kidnappings and an aggravated arson); *People v. Launsburry*, 551 N.W.2d 460, 463-64 (Mich Ct. App. 1996) (holding life in prison without parole was not cruel and unusual punishment for juvenile convicted of murder).

In addition, granting certiorari is the humane thing to do. Imprisoning a juvenile for life is inhumane where the juvenile did not commit a homicide. As this Court recently recognized, there is a "fundamental, moral distinction between a murderer and a robber," because "while robbery is a serious crime deserving serious punishment, it is not like death in its severity and irrevocability." *Kennedy*, 128 S. Ct. at 2660 (internal quotations omitted). Despite this moral distinction, Petitioner's punishment for his non-homicide crimes is the same, severe punishment he would have received had he intentionally murdered someone.

Though at first blush life in prison may seem less cruel and inhumane than a death sentence, in reality it is not. Some have said that life imprisonment is the

"equivalent" of a death sentence. *See, e.g., Brennan v. State*, 754 So. 2d 1, 11 n. 15 (Fla. 1999) (Anstead, J., specially concurring). Sadly, some juveniles imprisoned for life have stated that they would prefer the death penalty because life without parole is just a slower form of death, a "death sentence by incarceration." Elizabeth Cepparulo, Article, *Roper v. Simmons: Unveiling Juvenile Purgatory: Is Life Really Better than Death?*, 16 Temp. Pol. & Civ. Rts. L. Rev. 225, 225 & n.1, 248-29 & n. 257 (Fall 2006) (internal quotations omitted). Indeed, juveniles imprisoned for life face a far crueler punishment than their adult counterparts for a variety of reasons, including their diminished capacity to cope with long-term confinement and the fact that they will be confined for a much longer time (sixty to seventy years if they live into their seventies or eighties). Human Rights Watch/Amnesty Int'l, *supra*, at 52-54.

Given all of the above, this Court should grant certiorari, consider this case on the merits, and answer the question presented. This Court, as the highest court in the nation, should determine whether the Eighth Amendment allows the States to impose a sentence – imprisonment of a juvenile for life without parole for a non-homicide – that has been universally condemned by the international community and that, in practice, the States infrequently impose.

[SIGNATURE ON THE NEXT PAGE]

Respectfully submitted,

John S. Mills
Counsel of Record
Bryan S. Gowdy
Mills Creed & Gowdy, P.A.
865 May Street
Jacksonville, Florida 32204
(904) 350-0075
Counsel for Petitioner

November 20, 2008

OPPOSITION BRIEF

(28)

No. 08-7412

IN THE
SUPREME COURT OF THE UNITED STATES

TERRANCE JAMAR GRAHAM,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the
District Court of Appeal, First District of Florida

RESPONDENT'S BRIEF IN OPPOSITION

Respectfully Submitted,

BILL MCCOLLUM
Attorney General of Florida

EDWARD C. HILL, JR.
Special Counsel, Criminal Appeals
Counsel of Record
JOSHUA R. HELLER
Assistant Attorney General

Office of the Attorney General
PL-01 The Capitol
Tallahassee, FL 32399-1050
(850) 414-4593
(850) 922-6674 (fax)

Attorneys for Respondent

QUESTION PRESENTED

Petitioner states the question presented as:

> Whether the Eighth Amendment's ban on cruel and unusual punishments prohibits the imprisonment of a juvenile for life without the possibility of parole as punishment for the juvenile's commission of a non-homicide.

Respondent restates the question presented as:

> Whether life imprisonment is so grossly disproportionate as to violate the Eighth Amendment when imposed upon a seventeeen-year-old offender who violated his probationary sentence for a violent felony punishable by life imprisonment by committing another violent felony?

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iii

Opinion Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions 2

Statement of the Case 2

Reasons for Denying the Writ 15

Whether life imprisonment is so grossly disproportionate as to violate the Eighth Amendment when imposed upon a seventeeen-year-old offender who violated his probationary sentence for a violent felony punishable by life by committing another violent felony? 15

Conclusion 23

Appendix 24

Respondent's Answer Brief in Florida First DCA ..... App. A-1

TABLE OF AUTHORITIES

Pages

Cases

Blackshear v. State,
771 So. 2d 1199 (Fla. 4th DCA 2000) 17

Byrd v. Quarterman,
2008 WL 4427265 (N.D. Tex. Sept. 26, 2008) 19

Calderon v. Schribner,
2009 WL 89279 (E.D. Cal. Jan. 12, 2009) 16, 19

Cobos v. Dennison,
825 N.Y.S.2d 332 (N.Y. App. Div. 2006) 20

Connell v. State,
2008 Ala. Crim. App. LEXIS 108 (Ala. Crim. App. May 30, 2008) 20

Culpepper v. McDonough,
2007 WL 2050970 (M.D. Fla. July 13, 2007) 19

Culpepper v. State,
971 So. 2d 259 (Fla. 2d DCA 2008) 20

Douma v. Workman,
2007 WL 2331883 (N.D. Okla. 2007) 19

Ewing v. California,
538 U.S. 11 (2003) 21

Furman v. Georgia,
408 U.S. 238 (1972) 21

Gardner v. Florida,
430 U.S. 349 (1977) 21

Graham v. State,
982 So. 2d 43 (Fla. 1st DCA 2008) 1, 15

Graham v. State,
990 So. 2d 1058 (Fla. 2008) 1

Gurerro v. State,
2008 Tex. App. LEXIS 1837 (Tex. Crim. App. March 13, 2008) 20

Gussler v. Commonwealth,
236 S.W.3d 22 (Ky. Ct. App. 2007) 20

Harmlin v. Michigan,
501 U.S. 957 (1991) 18, 21

Hawkins v. Hargett,
200 F.3d 1279 (10th Cir. 1999) 18

Hutto v. Davis,
454 U.S. 370 (1982) 22

Jackson v. State,
2008 Tex. App. LEXIS 698 (Tex. App. Jan. 30, 2008) 17

Kennedy v. Louisiana,
___ U.S. ___, 128 S. Ct. 2641 (2008) 20

Lockyer v. Andrade,
538 U.S. 63 21

Manuel v. State,
629 So. 2d 1052 (Fla. 2d DCA 1993) 17

McCullough v. Singletary,
967 F.2d 530 (11th Cir. 1992) 18

McCullough v. State,
523 So. 2d 582 (Fla. 2d DCA 1988) 18

Naovarath v. State,
779 P.2d 944 (Nev. 1989) 16

People v. Chacon,
43 Cal. App. Rptr. 2d 434 (Cal. Ct. App. 1995) 17

People v. Demirdjian,
50 Cal. App. Rptr. 3d 183 (Cal. Ct. App. 2006) 20

People v. Diaz,
2008 Cal. App. Unpub LEXIS 10351(Cal. Ct. App. Dec. 22, 2008) 20

People v. Dillon,
668 P.2d 697 (Cal. 1983) 15

People v. Griffin,
857 N.E.2d 889 (Ill.App. Ct. 2006) 20

People v. Isitt,
127 Cal. Rptr. 279 (Cal. Ct. App. 1976) 17

People v. Metzger,
2008 Cal. App. Unpub. LEXIS 10492 (Cal. Ct. App. Dec. 29, 2008) 20

People v. Miller,
781 N.E.2d 300 (Ill. 2002) 15

Pineda v. Leblanc,
2008 WL 294685 (E.D. La. Jan. 31, 2008) 19

Price v. Cain,
2008 U.S. Dist. LEXIS 23474 (W.D. La. March 4, 2008) 19

Ring v. Arizona,
536 U.S. 584 (2002) 21

Rogers v. State,
515 S.W.2d 79 (Ark. 1979) 17

Roper v. Simmons,
543 U.S. 551 (2005) 13, 19, 22

Rummel v. Estelle,
445 U.S. 263 (1980) 20, 22

Schane v. Cain,
2007 U.S. Dist. LEXIS 96538 (W.D. La. Oct. 24, 2007) 19

Sims v. Commonwealth,
233 S.W.3d 731 (Ky. Ct. App. 2007) 20

Smith v. Howes,

2007 WL 522697 (E.D. Mich. Feb. 14, 2007) 19

Solem v. Helm,
463 U.S. 277 (1983) 18, 20, 21, 22

State v. Allen,
958 A.2d 1214 (Conn. 2008) 20

State v. Avery,
649 S.E.2d 102 (S.C. Ct. App. 2007) 20

State v. Bunch,
2007 Ohio 7211, 2007 Ohio App. LEXIS 6314 (Ohio Ct. App. Dec. 21, 2007) 16, 20

State v. Foley,
456 So. 2d 979 (La. 1984) 17

State v. Green,
502 S.E.2d 819 (N.C. 1998) 17

State v. Ira,
43 P.3d 359 (N.M. Ct. App. 2002) 18

State v. Medina,
622 S.E.2d 176 (N.C. Ct. App. 2005) 20

State v. Ocak,
2006 Wash. App. LEXIS 1126 (Wash. Ct. App. June 12, 2006) 20

State v. Rideout,
933 A.2d 706 (Vt. 2007) 20

State v. Standard,
569 S.E.2d 325 (S.C. 2002) 18

State v. Walker,
843 P.2d 203 (Kan. 1992) 17

State v. Warren,
887 N.E.2d 1145 (Ohio 2008) 16, 20

Thomas v. State,
2007 Tex. App. LEXIS 6212 (Tex. App. Aug. 7, 2007) 20

United States v. Feemster,
483 F.3d 583 (8th Cir. 2007) 19

United States v. Pete,
277 Fed. Appx. 730 (9th Cir. 2008) 19

United States v. Salahuddin,
509 F.3d 858 (7th Cir. 2007) 19

Van Pao Thao v. State,
2008 Minn. App. Unpub. LEXIS 1271 (Minn. Ct. App. Sept. 16, 2008) 20

Wallace v. State,
956 A.2d 630 (Del. 2008) 20

In re Welfare of L.F.G.-L.,
2007 Minn. App. Unpub. LEXIS 1089 (Minn. Ct. App. Nov. 6, 2007) 20

White v. State,
374 So. 2d 843 (Miss. 1979) 17

Wills v. State,
2005 Tex. App. LEXIS 7113 (Tex. App. Aug. 31, 2005) 20

Woodson v. North Carolina,
428 U.S. 280 (1976) 21

Workman v. Commonwealth,
429 S.W.2d 374 (Ky. 1968) 15

Statutes and Rules

U.S. SUP. CT. R. 10 ..... 15, 19, 22

FLA. R. CRIM P. 3.800(b)(2) 12

No. 08-7412

IN THE
SUPREME COURT OF THE UNITED STATES

TERRANCE JAMAR GRAHAM
Petitioner,

vs.

STATE OF FLORIDA
Respondent.

On Petition for Writ of Certiorari to the
District Court of Appeal, First District of Florida

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

Petitioner, Terrance Jamar Graham, seeks review of the decision of the District Court of Appeal, First District of Florida, affirming his conviction and sentence found at Graham v. State, 982 So. 2d 43 (Fla. 1st DCA 2008). The Florida Supreme Court's unpublished disposition declining jurisdiction can be found at Graham v. State, 990 So. 2d 1058 (Fla. 2008) (Table).

JURISDICTION

Respondent accepts as accurate Petitioner's statement of jurisdiction in this case.

CONSTITUTIONAL PROVISION

Respondent accepts as accurate Petitioner's statement regarding the constitutional provision implicated in this case.

STATEMENT OF THE CASE AND FACTS[1]

In this case, Petitioner, after benefiting from the imposition of a three-year probationary sentence for a violent felony for which he could have been punished by life imprisonment, violated his probation by committing another violent felony and admitted to committing at least two more violent felonies. Based on Petitioner's proven inability to rehabilitate and escalating pattern of criminal conduct, the trial court revoked Petitioner's probation and sentenced him to life imprisonment.

Petitioner, Terrance Jamar Graham, and two accomplices, Brandon Johnson and Marcus Harris, planned to rob Bono's Bar-B-Q for several weeks. (App. 2.) Petitioner and Mr. Johnson went to Bono's Bar-B-Q on previous occasions near the closing hour and commented on the business being short-staffed late at night. (App. 2.) On July 18, 2003, Petitioner and Mr. Johnson called Yusef Gudmalin and asked him for a ride. (App. 2.) Once inside the vehicle, Petitioner and Mr. Johnson told Mr. Gudmalin that they were going to "do a lick." (App. 2.) Mr. Gudmalin drove Petitioner and Mr. Johnson to Bono's Bar-B-Q, where Petitioner and Mr. Johnson, wearing masks, entered

---

[1] Citations herein reference Respondent's Appendix, which will be referenced as "App. X," or Petitioner's single-volume 107-page appendix, which will be referenced as "Pet. App. X."

the restaurant at approximately 11:00 to 11:30 p.m. through a rear door that was left unlocked by Mr. Harris. (App. 2–3.) Once inside, Petitioner and Mr. Johnson approached the restaurant manager, Paul William Diblasi, who was in the back room counting money. (App. 3.) Petitioner's accomplice, Mr. Johnson, hit Mr. Diblasi twice with a steel bar because Mr. Diblasi "wouldn't give [the money] up." (App. 3.) Mr. Diblasi turned around and started yelling at Petitioner and Mr. Johnson. and, after dropping the steel bar, Mr. Johnson and Petitioner ran out the back door, got back into Mr. Gudmalin's car, and fled the scene. (App. 3.)

On September 9, 2003, Petitioner's father called one of the investigating detectives, Detective Copeland, and told Detective Copeland that a couple of months ago he found what he thought were burglary tools and a black mask with the eyes cut out in his home. (App. 3.) Petitioner's father indicated to Detective Copeland that he believed Petitioner was committing burglaries and robberies with Mr. Johnson and another friend named Larry. (App. 3.) Petitioner's father guided Detective Copeland to his ex-wife's house, where Petitioner was hiding under a bed. (App. 3.) Petitioner admitted to Detective Copeland that he had committed the robbery of Bono's Bar-B-Q. (App. 3.)

On October 13, 2003, Petitioner was charged as an adult with one count of burglary with an assault or battery in violation of Sections 810.02(2)(a) and 810.02(2)(b), Florida Statutes, a first-degree felony punishable by life in prison; and attempted armed robbery in violation of Section 812.13(2)(b) and 777.04(1), Florida Statutes, a second-degree felony. (App. 3.) On October 20, 2003, Petitioner, who was

sixteen years old at the time of the offense, was certified as an adult following a hearing. (App. 3.)

On December 18, 2003, Petitioner pled guilty to both offenses and stipulated to the factual basis for the plea. (App. 4.) The trial court withheld adjudication and sentenced Petitioner to three years probation with the special condition of 12 months in the county jail (with 101 days credit) and 100 hours of community service. (App. 4.) During the plea colloquy, the trial court informed Petitioner–and Petitioner acknowledged–that he was agreeing to being sentenced as an adult and giving up his right to have the court consider the imposition of juvenile sanctions. (App. 4.) Accordingly, the trial court certified Petitioner as an adult for any future violations of Florida law. (App. 4.)

Petitioner was released from county jail on June 25, 2004. (App. 4.) On December 6, 2004, Petitioner was arrested on new felony charges of home invasion robbery and fleeing and eluding. (App. 4.) As a result of the new offenses, on December 13, 2004, the State filed an affidavit of violation of probation charging Petitioner with willfully and substantially violating the following conditions of his probation:

- Condition (3), by possessing, carrying, or owning any weapon or firearm;
- Condition (4), by failing to live and remain at liberty without violating any law by committing the offenses of Home Invasion Robbery, Fleeing/Attempting to Elude a Law Enforcement Officer, Aggravated Chase, and Operating a Motor Vehicle While Driver's License is Suspended or Revoked;
- Condition (5), by associating with persons engaged in criminal activity, specifically Kirkland Lawrence and Meigo Bailey; and

- Condition (11), by failing to make court cost payments.

(App. 4.)

The trial court held hearings on the violation of probation on December 16, 2005, and January 13, 2006. (App. 5.) Although he understood that his exposure would be 66.75 months to life whether he admitted to any or all of the criminal violations of probation, Petitioner admitted only to the fleeing and eluding violation. (App. 5.) The State then proceeded to prove the remaining allegations within the affidavit. The facts adduced at the hearings, viewed in the light most favorable to the trial court's ruling, established the following:

At all relevant times, Petitioner was on probation for a first degree felony punishable by life in prison. (App. 5.) Petitioner was read the conditions of his probation on June 29, 2004, and understood those conditions. (App. 5.)

On December 2, 2004, Mr. Carlos Rodriguez Lopez was living on Barnhill Drive, Apartment 26, with his wife and stepson. (App. 5.) At approximately 7:00 p.m., Mr. Rodriguez was at home with his friend, Noel, who he knew from English class. (App. 5.) Shortly after 7:00 p.m., Mr. Rodriguez heard a knock at the front door. (App. 5.) Mr. Rodriguez asked who was there, but no one answered. (App. 5.) When Mr. Rodriguez heard the knock again, he went to the door to open it. (App. 5.) When he opened the door, Mr. Rodriguez was confronted with three armed black males—Petitioner, Mr. Kirkland Lawrence, and Mr. Miego Bailey. (App. 5.) Petitioner—who was seventeen years old at the time—put a pistol in Mr. Rodriguez's stomach and entered Mr. Rodriguez's house first, followed by his accomplices. (App.

5.)

Petitioner and his accomplices laid Mr. Rodriguez on the living room floor, Petitioner held his gun to Mr. Rodriguez's head, and Petitioner yelled at Mr. Rodriguez, asking him where the money was. (App. 5.) Mr. Rodriguez repeatedly responded nervously, "No money, no money." (App. 5–6.) Mr. Rodriguez was in fear that Petitioner was going to shoot him. (App. 6.) Petitioner and his accomplices also brought Noel out from the bathroom, and laid him on the living room floor. (App. 6.) Petitioner and his accomplices stole a gold crucifix and chain from Noel. (App. 6.) After a while, Petitioner and his accomplices let Mr. Rodriguez and Noel stand. (App. 6.) Petitioner and his accomplices put Mr. Rodriguez and Noel into the closet, put furniture against the door, and left. (App. 6.)

After Petitioner left, there was a shooting at the Art Museum and Miego Bailey was shot. After Petitioner dropped Bailey off at the hospital, he was involved in a car chase with police on Ring Lane. (App. 6.) After the chase concluded, Crime Scene Detective Shaun Kobylarz of the Jacksonville Sheriff's Office photographed the car and three guns that were inside the car, including a firearm on the floorboard of the passenger's side of the vehicle. (App. 6.)

Detective Cesar Parrales of the Jacksonville Sheriff's Office was assigned to a task force that was created as a result of a series of home-invasion robberies of Hispanic victims. (App. 6.) As part of his duties on the Hispanic robberies task force, Detective Parrales was involved in investigating and arresting Petitioner. (App. 6.) As part of his duty on the task force, Detective Parrales met with Mr. Rodriguez who

immediately identified Petitioner as a perpetrator. (App. 6.) Mr. Rodriguez also identified Meigo Bailey and Kirkland Lawrence as the other perpetrators. (App. 6.) Additionally, Detective Parrales also recovered Noel's gold chain and crucifix from Mr. Lawrence's person. (App. 6.)

Additionally, after Petitioner was arrested, Petitioner was interviewed by Detective Brian Kee of the Jacksonville Sheriff's Office, who was also assigned to the Hispanic home-invasion task force. (App. 6.) After being Mirandized, Petitioner agreed to speak with Detective Kee. (App. 6.) Petitioner initially told Detective Kee that he was in his father's black Cadillac and he picked up a boy named Meigo who had been shot, and Miego's friend, Lawrence, who Petitioner saw on the side of the street, and then dropped them off at the hospital. (App. 6–7.) Petitioner also told Detective Kee that the police chased him from the hospital and he was caught by police. (App. 7.)

Detectives Kee and Parrales continued to question Petitioner, asking him about two robberies—the shooting at the Art Museum in which Mr. Bailey was shot and the home-invasion robbery in which Mr. Rodriguez was victimized. (App. 7.) The detectives also indicated Mr. Rodriguez had identified Petitioner as a perpetrator. (App. 7.) Detective Kee then asked Petitioner, "Aside from the two robberies tonight how many more were you involved in?" (App. 7.) Petitioner responded, "Two or three before tonight." (App. 7.)

Based on the evidence presented, the trial court found Petitioner in violation of three conditions of his probation. (App. 7.) First, the trial court found Petitioner in

violation of Condition 3 by possessing, carrying, or owning a weapon or firearm. (App. 7.) Second, the trial court found Petitioner violated Condition 4 of his probation by failing to remain and live at liberty without violating any new laws by committing the offense of home-invasion robbery. (App. 7.) The trial court also acknowledged that Petitioner admitted violating Condition 4 by admitting guilt to fleeing and attempting to elude a law enforcement officer. (App. 7.) Finally, the trial court found Petitioner violated Condition 5 of his probation by associating with persons engaged in criminal activity. (App. 7.) The Court did not find Petitioner had violated Condition 11, failing to make court costs payments. (App. 7.)

Petitioner was sentenced on his violation of probation on March 7–8, 2006, April 7, 2006, and May 25, 2006. (App. 7.) Petitioner had a number of individuals make statements on his behalf, including Mary Lee Graham, his mother (App. 7–8); Lanisha Graham, his aunt (App. 8); Tavaris Deangelo Graham, his brother (App. 8); Harry Jones, his biological father (App. 8); and Petitioner himself.

Petitioner asked for leniency because of the family difficulties his incarceration has caused. (App. 8.) Petitioner claimed he "manned up" to his violation because he admitted to fleeing and eluding since he would have violated his probation for missing his curfew. (App. 8.) Petitioner admitted dropping Meigo Bailey off at the hospital because he was shot. (App. 8.) The trial court reiterated the importance to Petitioner of being candid at sentencing. (App. 8.) Petitioner also denied being involved in the home-invasion robbery and denied making any admissions about being involved in two prior robberies to police. (App. 8.)

The State presented victim impact letters from Paul Deblasi and Carlos Rodriguez. (App. 8.) The State also presented a letter Petitioner wrote before he was sentenced on the burglary with assault or battery and armed robbery charges in 2003. (App. 8.)

The State presented testimony from Sergeant Daniel Johnson of the Jacksonville Sheriff's Office. (App. 8.) Sergeant Johnson was approaching Memorial Hospital where dispatch had informed him a black vehicle was fleeing after dropping off a victim of a shooting. (App. 8.) As he approached the hospital in his cruiser, Sergeant Johnson observed the black vehicle exit the parking lot of the hospital at a high rate of speed with a disregard for traffic. (App. 8.) In fact, Sergeant Johnson and the vehicle next to him both had to abruptly put on their brakes firmly to avoid being in a crash. (App. 8.) Sergeant Johnson then attempted to stop the vehicle, but when it was apparent the vehicle was not going to stop, he began a pursuit reaching better than 90 miles per hour down residential roads. (App. 8–9.) Ultimately, Petitioner failed to negotiate a turn, and his vehicle struck a telephone pole. (App. 9.) Petitioner then fled the vehicle on foot, and Sergeant Johnson followed Petitioner as he was running through backyards. (App. 9.) Sergeant Johnson ultimately apprehended Petitioner after the foot chase. (App. 9.)

The trial court also heard additional testimony from the victim, Carlos Rodriguez. (App. 9.) Mr. Rodriguez testified that Petitioner was the first one through the door during the home invasion robbery and that Petitioner put a gun to his stomach. (App. 9.) Mr. Rodriguez testified that Petitioner was the leader of the

perpetrators, because he was giving orders to the other men and seemed to be running the robbery. (App. 9.) Furthermore, Mr. Rodriguez testified that, as the home-invasion took place, Petitioner pointed a cocked gun at Mr. Rodriguez's head, putting Mr. Rodriguez in considerable fear. (App. 9.) Mr. Rodriguez explained that he and his family were "very scared" after the robbery and were attempting to "save money to be able to move somewhere else and . . . try to forget this." (App. 9.)

Finally, the trial court heard testimony from Kirkland Lawrence, one of Petitioner's co-defendants in the home-invasion robbery. (App. 9.) Mr. Lawrence testified that Petitioner was involved in the robbery and had a gun. (App. 9.) Mr. Lawrence also testified that he and an individual named Louis saw Mr. Rodriguez "going in the house with groceries one day," and, about a week before the robbery, he, Meigo Bailey, and Petitioner concocted the plan to engage in the home-invasion robbery. (App. 9.) Mr. Lawrence explained "everybody needed money." (App. 9.) Mr. Lawrence testified that Petitioner provided the vehicle for the robbery. (App. 9.) Mr. Lawrence testified that, during the robbery, the perpetrators were each "doing their own thing," and Petitioner said to Mr. Rodriguez, "Where the money at? Where the money at?" (App. 9.) Finally, Mr. Lawrence testified that he knew Petitioner was on probation and had to be home before his curfew. (App. 9–10.)

After hearing the testimony, the trial court found the following:

> THE COURT: Mr. Graham, as I look back on your case, yours is really candidly a sad situation. You had, as far as I can tell, you have quite a family structure. You had a lot of people who wanted to try and help you get your life turned around including the court system, and you had a judge who took the step to try and give you direction through his

probation order to give you a chance to get back onto track. And at the time you seemed through your letters that that is exactly what you wanted to do. And I don't know why it is that you threw your life away. I don't know why.

But you did, and that is what is so sad about this today is that you have actually been given a chance to get through this, the original charge [*sic*], which were very serious charges to begin with. The burglary with assault charge is an extremely serious charge. The attempted robbery with a weapon was a very serious charge. . . . And you get an opportunity and you throw it away. How old are you now?

THE DEFENDANT: Nineteen.

THE COURT: And how old were you when this started?

THE DEFENDANT: Seventeen.

THE COURT: And in less than two years—actually, a lot less than that, in a very short period of time you were back before the Court on a violation of probation, and then here you are two years later standing before me, literally the—facing a life sentence as to—up to life as to count 1 and up to 15 years as to count 2.

And I don't understand why you would be given such a great opportunity to do something with your life and why you would throw it away. The only thing that I can rationalize is that you decided that this is how you were going to lead your life and that there is nothing that we can do for you. And as the state pointed out, that this is an escalating pattern of criminal conduct on your part and that we can't help you any further. We can't do anything to deter you. This is the way you are going to lead your life, and I don't know why you are going to. You've made that decision. I have no idea. But, evidently, that is what you decided to do.

So then it becomes a focus, if I can't do anything to help you, if I can't do anything to get you back on the right path, then I have to start focusing on the community and trying to protect the community from your actions. And unfortunately, that is where we are today is I don't see where I can do anything to help you any further. You've evidently decided this is the direction you're going to take in life, and it's unfortunate that you made that choice.

I have reviewed the statute. I don't see where any further juvenile sanctions would be appropriate. I don't see where any youthful offender sanctions would be appropriate. Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try to protect the community from your actions.

(App. 10–11.)

Having previously found Petitioner in violation of his probation, the trial court, by judgment rendered on May 25, 2006, adjudicated Petitioner guilty on count I, the burglary with an assault or battery, and sentenced Petitioner to life in prison with credit for 12 months and 496 days already served. (App. 11.) The trial court also adjudicated Petitioner guilty of attempted robbery with a weapon and sentenced Petitioner to 15 years in prison with 12 months and 496 days credit for time served, to run concurrently with count I. (App. 11.) The trial court also revoked and terminated Petitioner's probation. (App. 11.)

On June 14, 2006, Petitioner filed a Notice of Appeal of the final Order of Judgment and Sentence. (App. 11.) On June 23, 2006, Petitioner filed a second Notice of Appeal of the Order of Violation of Probation and the final Order of Judgment and Sentence. (App. 11.)

On January 19, 2007, Petitioner filed a Memorandum of Law in Support of Motion to Correct Sentencing Error and Illegal Sentence. (App. 11.) On May 2, 2007, Petitioner filed a Motion to Correct Sentencing Error and Illegal Sentence, pursuant to Rule 3.800(b)(2) of the Florida Rules of Criminal Procedure. (App. 11.) In his motion and memorandum, Petitioner alleged his sentence was illegal because it was in violation of the Florida and federal constitutional prohibitions on cruel and unusual punishment. (App. 11.) No ruling by the trial court appears in the record.

On April 10, 2008, the Florida First District Court of Appeal issued a twenty-two (22) page opinion extensively analyzing Petitioner's claim that his sentence violates the prohibitions on cruel and unusual punishment, rejecting his claim, and affirming his

conviction and sentence. (Pet. App. 1–22.) As to Petitioner's facial challenge, the Florida First District Court of Appeal determined that Petitioner's life sentence is not facially invalid under this Court's decision in Roper v. Simmons, 543 U.S. 551 (2005), because, as this Court has recognized, "death is different." (Pet. App. 4–12.) The First District rejected the claim that sentencing a juvenile to life imprisonment is cruel and unusual in all situations. (Pet. App. 6–12.)

The First District also rejected Petitioner's *per se* claim as contrary to international norms. (Pet. App. 12–15.) The First District recognized that this Court found in Roper that such reliance on international norms is "not controlling" and that, "[w]hile the weight given the international community is persuasive," based on the "broad authority that legislatures necessarily possess in determining the types and limits of punishment, as well as the discretion that trial courts possess in sentencing criminals," it "cannot be said to counter the individual rights of the state to impose its chosen sentencing scheme if that scheme is not held to be otherwise unconstitutional." (Pet. App. 12–15.)

The First District then rejected Petitioner's *as applied* challenge that his life sentence was grossly disproportionate to his offense, recognizing that the "record facts . . . establish that, after being placed on probation—an extremely lenient sentence for the commission of a life felony—appellant committed at least two armed robberies and confessed to the commission of an additional three." (Pet. App. 15–19.) The First District also recognized, "These offenses were not committed by a pre-teen, but a seventeen-year-old . . . ." (Pet. App. 17.) Further, the First District recognized,

"Additionally, these robberies involved the use of a weapon, and appellant himself held a gun to a man's head during the incident for which [his probation] was violated." (Pet. App. 17.) The First District also recognized that Petitioner, who wrote a letter expressing his remorse and promising to refrain from criminal activity when he "was given an unheard of probationary sentence for a life felony . . . rejected his second chance and chose to continue committing crimes at an escalating pace." (Pet. App. 18.) Accordingly, "the tested theory of rehabilitation" and Petitioner's "inability to rehabilitate" justified the life sentence Petitioner received in this case. (Pet. App. 18–19.)

Finally, the First District rejected Petitioner's claim that his sentence violated the United Nations International Covenant on Civil and Political Rights (ICCPR), concluding that, even if Petitioner had standing to raise such a claim, the treaty is not self-executing and no judicially enforceable right directly arises out of the ICCPR. (Pet. App. 19–22.) Accordingly, the First District affirmed Petitioner's conviction and sentence. (Pet. App. 22.)

Petitioner sought review in the Florida Supreme Court, and, on August 22, 2008, the Florida Supreme Court declined jurisdiction. (Pet. App. 107.)

REASONS FOR DENYING THE WRIT

Whether life imprisonment is so grossly disproportionate as to violate the Eighth Amendment when imposed upon a seventeeen-year-old offender who violated his probationary sentence for a violent felony punishable by life by committing another violent felony?

Petitioner is a violent recidivist. Petitioner violated his probationary sentence for a felony punishable by life under Florida law by engaging in an escalating pattern of criminal conduct, to wit: a home-invasion robbery at gunpoint and holding the gun to that victim's head, which Petitioner admitted was one of a number of robberies in which he engaged. Graham, 982 So. 2d at 52.

Petitioner has failed to demonstrate the need for granting his petition to resolve an asserted conflict amongst the federal circuits and state courts. See U.S. SUP. CT. R. 10(b). Indeed, three of the four cases upon which Petitioner relies were decided ***on independent state law grounds*** and involved entirely disparate facts from this case. In People v. Miller, 781 N.E.2d 300 (Ill. 2002), the Illinois Supreme Court invalidated a life sentence for a juvenile *convicted on a theory of accountability* based on the *Illinois Constitution proportionate penalties clause*. See id. at 307–08. In Workman v. Commonwealth, 429 S.W.2d 374 (Ky. 1968), the Kentucky Court of Appeals determined that life imprisonment for a *fourteen-year old* rapist violated "*section 17 of the* [Kentucky] *Constitution* . . ." Id. at 375, 378. In People v. Dillon, 668 P.2d 697 (Cal. 1983), the California Supreme Court determined that life imprisonment for a juvenile convicted based on the *felony-murder rule* violated the *California Constitution's* cruel or unusual punishment clause. Id. at 700–01, 719–27 (italics

added).

In the last case upon which Petitioner relies on, Naovarath v. State, 779 P.2d 944 (Nev. 1989), the Supreme Court of Nevada determined that it constituted cruel and unusual punishment based on the Nevada and federal constitution to sentence a "*mentally and emotionally disordered thirteen-year-old*" to life in prison for the singular offense of murdering his own molester. Id. at 945, 949. This lies in stark contrast to Petitioner, a violent recidivist who, at seventeen, was sentenced for violent crimes against a victim he did not know. Petitioner has established neither his assertion that "the state courts have not agreed with one another" about whether life imprisonment is a permissible punishment *under the Eighth Amendment* for a violent recidivist near the age of majority nor demonstrated any conflict amid the cases used as examples herein.

Compared to other defendants, many of whom are younger than Petitioner, the sentence of life imprisonment is not uncommon for a juvenile engaged in violent criminal activity, particularly where that juvenile is a recidivist. Calderon v. Schribner, 2009 WL 89279, *4–6 (E.D. Cal. Jan. 12, 2009) (upholding life sentence without parole for a seventeen-year old convicted of kidnaping for ransom with bodily injury, but not death); State v. Warren, 887 N.E.2d 1145 (Ohio 2008) (upholding life sentence without parole for a *fifteen-year-old* convicted for kidnaping and forcibly raping a nine-year-old victim over two months); State v. Bunch, Case No. 06-MA-106, 2007 Ohio App. LEXIS 6314, 2007 Ohio 7211 (Ohio Ct. App. Dec. 21, 2007) (seventeen-year-old properly sentenced to 89 years in prison without parole, which he asserted was

a life sentence, for aggravated robbery, rape, kidnaping, and aggravated menacing); Blackshear v. State, 771 So. 2d 1199 (Fla. 4th DCA 2000) (finding a defendant properly sentenced to life imprisonment for violating his probation imposed when he was *thirteen years old* for three robberies with a firearm); State v. Green, 502 S.E.2d 819, 827-34 (N.C. 1998) (holding that mandatory life sentence for *thirteen-year-old* convicted of a first-degree sexual offense does not constitute cruel and unusual punishment); People v. Chacon, 43 Cal. Rptr. 2d 434, 441–42 (Cal. App. Ct. 1995) (holding life without parole for two *sixteen-year-olds* convicted of aggravated kidnaping of a youth authority facility librarian does not constitute cruel and unusual punishment); Manuel v. State, 629 So. 2d 1052 (Fla. 2d DCA 1993) (remanding to consider whether *thirteen-year-old* sentenced to life had counsel for prior juvenile convictions included in scoresheet which recommended life sentence for attempted murder and armed robbery); State v. Walker, 843 P. 2d 203, 213–14 (Kan. 1992) (life sentence for *fourteen-year-old* active participant in two aggravated kidnapings and an aggravated arson); State v. Foley, 456 So. 2d 979 (La. 1984) (*fifteen-year-old's* life sentence without the possibility of parole for aggravated rape proportional); White v. State, 374 So. 2d 843 (Miss. 1979) (life without possibility of parole for *sixteen-year-old* armed robber and kidnaper); People v. Isitt, 127 Cal. Rptr. 279 (Cal. Ct. App. 1976) (seventeen-year-old sentenced to life without parole for kidnaping and robbery with bodily harm); Rogers v. State, 515 S.W.2d 79 (Ark. 1979) (seventeen-year-old first-time offender rapist sentenced to life without parole); see also Jackson v. State, Case No. 10-07-00089-CR, 2008 Tex. App. LEXIS 698, *15–20 (Tex. App. Jan. 30, 2008) (upholding

life sentence, apparently with possibility of parole, for offender "less than 17" convicted of aggravated robbery on elderly persons, one of which was disabled, with a deadly weapon); State v. Standard, 569 S.E.2d 325, 329 (S.C. 2002) ("[W]e find lengthy sentences or sentences of life without parole imposed upon juveniles do not violate contemporary standards of decency so as to constitute cruel and unusual punishment."); State v. Ira, 43 P.3d 359 (N.M. Ct. App. 2002) (upholding 91½ year sentence for a fifteen-year old who repeatedly sexually assaulted his nine-year-old stepsister and indicating that possibility of parole "will not ripen for a very long time").

There is no conflict between this case and decisions of the federal circuits. In McCullough v. Singletary, 967 F.2d 530 (11th Cir. 1992), cert. denied, 507 U.S. 975 (1993), the Eleventh Circuit found the Eighth Amendment was not violated when a seventeen-year-old was sentenced to life in prison without the possibility of parole after being convicted of first-degree burglary and sexual assault. Id. at 531. The Florida Second District Court of Appeal affirmed per curiam without opinion. See McCullough v. State, 523 So. 2d 582 (Fla. 2d DCA 1988). Applying this Court's decisions in Harmelin v. Michigan, 501 U.S. 957 (1991) and Solem v. Helm, 463 U.S. 277 (1983), the Eleventh Circuit found that the defendant's convictions "involved a crime of violence against a person," and his sentence "[t]herefore . . . is not grossly disproportionate" and needed to go no farther. McCullough, 967 F.2d at 535; see also Hawkins v. Hargett, 200 F.3d 1279 (10th Cir. 1999) (finding thirteen-year-and-eleven-month-old defendant's consecutive sentences for single criminal episode of burglary, robbery with a dangerous weapon, rape, and forceable sodomy, which resulted in a 100-

year term of imprisonment, did not violate the Eighth Amendment), cert. denied, 531 U.S. 830 (2000).

Moreover, there is no conflict between the Florida state court and any relevant decisions of this Court. See U.S. SUP. CT. R. 10(c). Petitioner points to *no case* where a court has determined that this Court's decision in Roper v. Simmons, 543 U.S. 551 (2005), should be applied to prohibit life imprisonment involving a juvenile, much less a violent recidivist near the age of majority. Rather, those courts that have considered the applicability of Roper to a juvenile's term of life imprisonment have universally decided the issue *against* Petitioner's position. See United States v. Pete, 277 Fed. Appx. 730, 734 (9th Cir. 2008); United States v. Feemster, 483 F.3d 583, 588 (8th Cir. 2007), vacated on other grounds, 128 S. Ct. 880 (2008); United States v. Salahuddin, 509 F.3d 858 (7th Cir. 2007); Calderon v. Schribner, 2009 WL 89279, *4–6 (E.D. Cal. Jan. 12, 2009); Culpepper v. McDonough, 2007 WL 2050970, *4–5 (M.D. Fla. July 13, 2007); Douma v. Workman, 2007 WL 2331883, *3 (N.D. Okla. 2007); Pineda v. Leblanc, Case No. 07-3598, 2008 WL 294685, *3 (E.D. La. Jan. 31, 2008); Price v. Cain, Case No. 07-937, 2008 U.S. Dist. LEXIS 23474, *17–23 (W.D. La. March 4, 2008); Byrd v. Quarterman, Case No. 3:08cv1414b, 2008 WL 4427265, *2 (N.D. Tex. Sept. 26, 2008); Schane v. Cain, Case No. 07-1068, 2007 U.S. Dist. LEXIS 96538, *10–12 (W.D. La. Oct. 24, 2007); cf. Smith v. Howes, Case No. 06cv10905, 2007 WL 522697, *2 (E.D. Mich. Feb. 14, 2007) (finding *Roper* inapplicable to juvenile sentenced to thirty to sixty years

in prison).[2]

While Petitioner references this Court's death penalty decisions in Roper, Thompson v. Oklahoma, 487 U.S. 815 (1988), and Kennedy v. Louisiana, ___ U.S. ___, 128 S. Ct. 2641 (2008), this Court has found that "the death penalty is different from other punishments in kind rather than degree." Helm, 463 U.S. at 294. This Court recognized in Rummel v. Estelle, 445 U.S. 263 (1980):

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodies in our concept of humanity.

---

[2] State court decisions are in accord. See Connell v. State, Case No. CR-06-0668, 2008 Ala. Crim. App. LEXIS 108, *10 (Ala. Crim. App. May 30, 2008); People v. Metzger, Case No. B198096, 2008 Cal. App. Unpub. LEXIS 10492, *27-28 (Cal. Ct. App. Dec. 29, 2008); People v. Diaz, Case No. F052637, 2008 Cal. App. Unpub. LEXIS 10351, *13-17 (Cal. Ct. App. Dec. 22, 2008); People v. Demirdjian, 50 Cal. Rptr. 3d 184, 186-87 (Cal. App. Ct. 2006); State v. Allen, 958 A.2d 1214, 1233-36 (Conn. 2008); Wallace v. State, 956 A.2d 630, 638-41 (Del. 2008); Culpepper v. State, 971 So. 2d 259, 260-61 (Fla. 2d DCA 2008); People v. Griffin, 857 N.E.2d 889, 899 (Ill. App. Ct. 2006); Sims v. Commonwealth, 233 S.W.3d 731, 732-33 (Ky. Ct. App. 2007); Gussler v. Commonwealth, 236 S.W.3d 22, 23-24 (Ky. Ct. App. 2007); Van Pao Thao v. State, Case No. A07-2137, 2008 Minn. App. Unpub. LEXIS 1271, *11 n.3 (Minn. Ct. App., Sept. 16 2008); In re Welfare of L.F.G.-L., Case No. A07-366, 2007 Minn. App. Unpub. LEXIS 1089, *9-10 (Minn. Ct. App. Nov. 6, 2007); State v. Medina, 622 S.E.2d 176, 182 (N.C. Ct. App. 2005); State v. Warren, 887 N.E.2d 1145, 1149 (Ohio 2008); State v. Bunch, Case No. 06-MA-106, 2007 Ohio 7211, 2007 Ohio App. LEXIS 6314, **11-12 (Ohio Ct. App. Dec. 21, 2007); Thomas v. State, Case No. 14-06-00066-CR, 2007 Tex. App. LEXIS 6212, *15-19 (Tex. App. Aug. 7, 2007), cert. denied, 2008 U.S. LEXIS 6542 (Oct. 6, 2008); State v. Rideout, 933 A.2d 706, 718-19 (Vt. 2007); see also Cobos v. Dennison, 825 N.Y.S.2d 332 (N.Y. Sup. Ct., App. Div. 2006); State v. Avery, 649 S.E.2d 102, 108 (S.C. Ct. App. 2007); Gurerro v. State, Case No. 13-05-00709-CR, 2008 Tex. App. LEXIS 1837, *4-8 (Tex. Crim. App. March 13, 2008); Wills v. State, Case No. 06-04-00172-CR, 2005 Tex. App. LEXIS 7113, *7-8 (Tex. App. Aug. 31, 2005); State v. Ocak, Case No. 56006-9-I, 2006 Wash. App. LEXIS 1126, *2 (Wash. Ct. App. June 12, 2006).

Id. at 272 (quoting Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring)). Further, this Court stated in Harmelin, "Our cases creating and clarifying the 'individualized capital sentencing doctrine' have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties." 501 U.S. at 994. Simply stated, "death is different." See, e.g., Ring v. Arizona, 536 U.S. 584, 605–06 (2002); Gardner v. Florida, 430 U.S. 349, 357–58 (1977) ("[Death] is different in both its severity and its finality . . . [and] differs dramatically from any other legitimate state action.") (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.") (plurality opinion).

Moreover, outside the context of the death penalty, this Court has always examined whether a sentence is grossly disproportionate under the Eight Amendment by examining the sentence in relation to the offender's instant offense and prior offenses, not the individual characteristics of offender, such as age or mental capacity. See Lockyer v. Andrade, 538 U.S. 63,70–74 (2003); Ewing v. California, 538 U.S. 11, 29–30 (2003) (examining "gravity" of offender's offense and "long history of felony recidivism") (plurality opinion); Harmlin, 538 U.S. at 994 (Scalia, J.) (finding gross disproportionality should apply only to capital sentences) (plurality opinion); Id. at 997, 1001 (finding strict proportionality is not required "between crime and sentence") (Kennedy, J., concurring in part and concurring in judgment); Helm, 463 U.S. at

290–92 (court examines "the gravity of offense and the harshness of penalty" and how it compares to the other criminals in the same and other jurisdictions); Hutto v. Davis, 454 U.S. 370 (1982) (per curiam); Rummel, 445 U.S. at 274 ("for crimes concededly classified and classifiable as felonies . . . the length of sentence actually imposed is purely a matter of legislative prerogative"). Indeed, this Court has recognized that a state is permitted to make "a societal decision that when [a person who has previously committed a felony] commits yet another felony, he should be subjected to the admittedly serious penalty of incarceration for life, subject only to *the State's judgment* as to whether to grant him parole." Rummel, 445 U.S. at 278 (emphasis added).

Furthermore, as some of the courts rejecting Petitioner's position have recognized, the punishment that Petitioner seeks certiorari to argue is unconstitutionally applied to him here was the punishment that this Court approved as constitutionally permissible for a juvenile in Roper, life imprisonment. 543 U.S. at 560, 578–79, 125 S.Ct. 1183 (affirming a life sentence without the possibility of parole for a conviction based on juvenile conduct). Petitioner has failed to present any meritorious basis for granting certiorari or a basis that requires extension of Roper to a series of circumstances neither involving capital punishment nor contemplated within this Court's opinion in Roper.[3] Respondent urges this Court to deny certiorari.

---

[3] Neither opinions of members of the "international community" (Pet. at 5), nor Petitioner's opinion of what is or is not "humane" (Pet. at 8) are a basis in this Court's rules to grant a Petition for Writ of Certiorari. See U.S. SUP. CT. R. 10.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully Submitted,

BILL MCCOLLUM
Attorney General of Florida

EDWARD C. HILL, JR.
Special Counsel, Criminal Appeals
Counsel of Record

JOSHUA R. HELLER
Assistant Attorney General

Office of the Attorney General
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3579
(850) 487-0997 (fax)

Attorneys for Respondent

No. 08-7412

IN THE
SUPREME COURT OF THE UNITED STATES

TERRANCE JAMAR GRAHAM,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the
District Court of Appeal, First District of Florida

RESPONDENT'S APPENDIX

A RESPONDENT'S ANSWER BRIEF IN FLORIDA FIRST DCA . . . *App. A-1*

No. 08-7412

IN THE SUPREME COURT OF THE UNITED STATES

TERRANCE JAMAR GRAHAM, *Petitioner,*

vs.

STATE OF FLORIDA, *Respondent.*

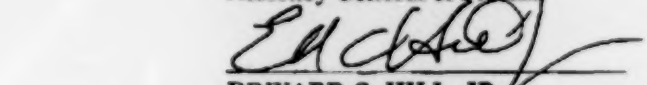
RESPONDENT'S PROOF OF SERVICE

Comes now Respondent, by and through counsel, and hereby certifies that pursuant to United States Supreme Court Rule 29, a true and correct copy of Respondent's Brief In Opposition was mailed, postage prepaid on this 3rd day of February 2009, to opposing counsel, as designated below:

John S. Mills & Bryan S. Gowdy
Mills, Creed & Gowdy, P.A.
865 May Street
Jacksonville, Florida 32204

Respectfully Submitted,

BILL MCCOLLUM
Attorney General of Florida



EDWARD C. HILL, JR.
Special Counsel, Criminal Appeals
Counsel of Record
JOSHUA R. HELLER
Assistant Attorney General
Office of the Attorney General
PL-01 The Capitol
Tallahassee, FL 32399-1050
(850) 414-4593
(850) 922-6674 (fax)

Attorneys for Respondent

JOINT APPENDIX

No. 08-7412

Supreme Court, U.S.
FILED
JUL 16 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writ Of Certiorari To The District Court Of Appeal, First District, State Of Florida

JOINT APPENDIX: VOLUME I OF III (Pages 1 to 211)

BRYAN S. GOWDY*
JOHN S. MILLS
REBECCA BOWEN CREED
JESSIE L. HARRELL
MILLS CREED & GOWDY, P.A.
865 May Street
Jacksonville, FL 32204
(904) 350-0075
bgowdy@appellate-firm.com

DREW S. DAYS, III
BRIAN R. MATSUI
SETH M. GALANTER
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, DC 20006

GEORGE C. HARRIS
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105

Counsel for Petitioner

BILL MCCOLLUM
Attorney General
SCOTT D. MAKAR*
Solicitor General
OFFICE OF THE ATTORNEY GENERAL OF FLORIDA
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300
scott.makar@myfloridalegal.com

Counsel for Respondent

Counsel of Record

Petition For Certiorari Filed November 20, 2008
Certiorari Granted May 4, 2009

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

VOLUME I

Relevant Docket Entries:

Circuit Court, Fourth Judicial Circuit of Florida 1

First District Court of Appeal of Florida 3

Supreme Court of Florida 5

Information, filed October 13, 2003 6

Motion for Reasonable Bond, filed November 13, 2003 9

State's Discovery Exhibit and Demand for Reciprocal Discovery, filed November 19, 2003 12

Plea of Guilty and Negotiated Sentence and Waiver of Rights and Sentencing Procedures Under § 985.233, Florida Statutes, filed December 18, 2003 17

Certification of Minor as an Adult, entered December 18, 2003 28

Transcript of Proceedings before Hon. Peter L. Dearing, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, on December 18, 2003 30

Rule 3.992(a) Criminal Punishment Code Scoresheet, filed December 18, 2003 39

Order of Probation (Certified Juvenile), entered January 7, 2004 42

TABLE OF CONTENTS – Continued

Page

Arrest and Booking Report, filed December 8, 2004 50

Affidavit of Violation of Probation, filed December 13, 2004 53

State of Florida Department of Corrections Violation Report, filed December 13, 2004 56

Admission of Violation of Probation/ Community Control and Negotiated Sentence—Form 8, filed December 16, 2005 64

Transcript of Proceedings before Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, on December 16, 2005 67

Transcript of Proceedings before Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, on January 13, 2006 195

Letter from Paul DiBlasi to Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, filed March 7, 2006 205

Letter from Carlos Rodriguez to Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, dated March 7, 2006 207

Letter to Counsel from Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, dated March 7, 2006 208

TABLE OF CONTENTS – Continued

Page

Enclosure: Letter from Mary Graham to Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, dated March 1, 2006 209

VOLUME II

Transcript of Proceedings before Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, on March 7-8 and April 7, 2006 212

Letter to Counsel from Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, dated May 17, 2006 283

Enclosure: Letter from Mary Graham to Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, dated May 14, 2006 284

Excerpt of Letter from Terrance Graham to Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, filed May 25, 2006 287

Rule 3.992(a) Criminal Punishment Code Scoresheet, filed May 25, 2006 289

Judgment of the Circuit Court, Fourth Judicial Circuit of Florida, filed May 25, 2006 292

Order of the Circuit Court, Fourth Judicial Circuit of Florida, Revoking Probation, filed May 25, 2006 305

TABLE OF CONTENTS – Continued

Page

Transcript of Proceedings before Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, on May 25, 2006 307

Uniform Commitment to Custody, entered May 30, 2006 398

Notice of Appeal, filed June 14, 2006.....401

Letter to Counsel from Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, dated July 24, 2006 402

Enclosure: Letter from Mary Graham to Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, dated July 10, 2006 403

Opinion of the First District Court of Appeal of Florida, filed April 10, 2008.....406

Order of the First District Court of Appeal of Florida Denying Motion for Rehearing, Clarification and Certification, entered May 16, 2008 432

Order of the Supreme Court of Florida Denying Petition for Review, entered August 22, 2008.....433

Letter from the Supreme Court of the United States respecting the grant of *certiorari* and leave to proceed in forma pauperis, dated May 4, 2009 435

TABLE OF CONTENTS – Continued

Page

VOLUME III (Under Seal)

Pre-Sentence Investigation Report, filed May 25, 2006 436

Attachment: Department of Corrections Case Management Program Mental Health Assessment Report 446

Attachment: Statement of Defendant Terrance Graham 450

The following documents have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

Defendant's Motion to Correct Sentencing Error and Illegal Sentence Pursuant to Fla. R. Crim. P. 3.800(b)(2), filed in the Circuit Court, Fourth Judicial Circuit of Florida, on January 17, 2007 ..... APP 24

Defendant's Memorandum of Law in Support of Motion to Correct Sentencing Error and Illegal Sentence Pursuant to Fla. R. Crim. P. 3.800(b)(2), filed in the Circuit Court, Fourth Judicial Circuit of Florida, on January 17, 2007 ..... APP 28

Initial Brief of Appellant Terrance Jamar Graham, filed in the First District Court of Appeal of Florida on May 22, 2007 ..... APP 57

TABLE OF CONTENTS – Continued

Page

Appellant's Motion for Rehearing, Clarification, and for Certification of a Question of Great Public Importance, filed in the First District Court of Appeal of Florida on October 29, 2007 ..... APP 95

Notice to Invoke Discretionary Jurisdiction of the Supreme Court of Florida, filed June 12, 2008 ..... APP 105

Certificate of Indigency Issued by the First District Court of Appeal of Florida, filed August 11, 2008 ..... APP 104

RELEVANT DOCKET ENTRIES

Circuit Court, Fourth Judicial Circuit of Florida
State of Florida v. Terrance Jamar Graham
Case No. 16-2003-CF-11912-AXXX-MA

10/13/03	Information filed
11/13/03	Motion for Reasonable Bond filed by defendant
11/19/03	State's Discovery Exhibit and Demand for Reciprocal Discovery filed
12/18/03	Hearing held before Hon. Peter L. Dearing, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida
12/18/03	Plea of Guilty and Negotiated Sentence and Waiver of Rights and Sentencing Procedures filed
12/18/03	Certification of Minor as an Adult entered
12/18/03	Rule 3.992(a) Criminal Punishment Code Scoresheet filed
01/07/04	Order of Probation entered
12/13/04	Affidavit of Violation of Probation filed
12/13/04	State of Florida Department of Corrections Violation Report filed
12/16/05	Hearing held before Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida
12/16/05	State's Exhibits 1-10 filed

12/16/05	Admission of Violation of Probation/ Community Control and Negotiated Sentence – Form 8 filed
01/13/06	Hearing held before Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida
03/07/06	Hearing held before Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida
04/07/06	Hearing held before Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida
05/25/06	Rule 3.992(a) Criminal Punishment Code Scoresheet filed
05/25/06	Pre-Sentence Investigation Report filed
05/25/06	Hearing held before Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida
05/25/06	Judgment entered
05/25/06	Order revoking probation entered
05/30/06	Uniform Commitment to Custody entered
06/14/06	Notice of Appeal filed by defendant
01/17/07	Defendant's Motion to Correct Sentencing Error and Illegal Sentence Pursuant to Fla. R. Crim. P. 3.800(b)(2) and Memorandum of Law in Support of Motion filed

First District Court of Appeal of Florida
Terrance Jamar Graham v. State of Florida
Case No. 1D06-3190

01/19/07	Notice of Sentencing Error filed by appellant
05/22/07	Initial Brief of Appellant filed
10/03/07	Appellee's Answer Brief filed
10/30/07	Motion to Relinquish Jurisdiction filed by appellant
11/02/07	Order to Show Cause Why Motion to Relinquish Jurisdiction Should Not Be Granted entered
11/08/07	Appellee's Response to Motion to Relinquish Jurisdiction filed
11/19/07	Appellant's Reply Brief filed
11/19/07	Motion for Oral Argument filed by appellant
11/29/07	Objection to Motion for Oral Argument filed by appellee
12/04/07	Motion for Oral Argument granted
01/09/08	Notice of Supplemental Authority filed by appellee
02/28/08	Notice of Supplemental Authority filed by appellee
04/10/08	Opinion and Judgment entered

04/25/08	Appellant's Motion for Rehearing, Clarification, and for Certification of a Question of Great Public Importance filed
05/16/08	Order denying Appellant's Motion for Rehearing, Clarification, and for Certification of a Question of Great Public Importance entered
06/03/08	Mandate issued
06/13/08	Notice to Invoke Discretionary Jurisdiction of the Supreme Court of Florida filed by appellant

Supreme Court of Florida
Terrance Jamar Graham v. State of Florida
Case No. SC08-1169

07/15/08	Initial Brief in support of Discretionary Jurisdiction filed by petitioner
07/21/08	Answering Brief opposing discretionary jurisdiction filed by respondent
08/22 08	Order denying petition for review entered

S.A. CASE NO.:
03CF676063AD

STATE OF FLORIDA

vs.

TERRANCE JAMAR GRAHAM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT IN AND FOR DUVAL COUNTY, FLORIDA

Spring Term, in the year two thousand three

CLERK NO.:
16-2003-CF 11912 AX

DIVISION: CRG

INFORMATION FOR:

1) ARMED BURGLARY WITH ASSAULT OR BATTERY
2) ATTEMPTED ARMED ROBBERY

IN THE NAME OF AND BY AUTHORITY OF THE STATE OF FLORIDA, HARRY L. SHORSTEIN, State Attorney for the Fourth Judicial Circuit of the State of Florida, in and for Duval County, charges that:

COUNT 1: TERRANCE JAMAR GRAHAM on July 18, 2003, in the County of Duval and the State of Florida, did unlawfully enter or remain in a structure, to-wit: a building, the property of BONO'S BARBEQUE, with the intent to commit an offense therein, to-wit: theft and while in the course of committing the offense was or became armed with a dangerous weapon, to-wit: a pipe and/or rod within said structure, and/or made an assault or battery upon another, to-wit: PAUL WILLIAM DIBLASI, contrary to the provisions of Sections 810.02(2)(a) and 810.02(2)(b), Florida Statutes.

COUNT 2: TERRANCE JAMAR GRAHAM on July 18, 2003, in the County of Duval and the State of Florida, did unlawfully by force, violence, assault, or putting in fear, attempt to take currency or other property, the property of BONO'S BARBEQUE as owner or custodian, from the person or custody of PAUL WILLIAM DIBLASI, and in the course of attempting to commit said robbery, carried a weapon, to-wit: a pipe and/or rod, contrary to the provisions of Sections 812.13(2)(b) and 777.04(1), Florida Statutes.

HARRY L. SHORSTEIN, STATE ATTORNEY FOURTH JUDICIAL CIRCUIT

By: /s/ Shirley W. Durham
Assistant State Attorney

STATE OF FLORIDA)
COUNTY OF DUVAL)

Personally appeared before me, Shirley W. Durham, Assistant State Attorney, for the Fourth Judicial Circuit of the State of Florida, in and for Duval County, who is personally known to me, and who being first duly sworn, says that the allegations as set forth in the foregoing information are based upon facts that have been sworn to as true, and which, if true, would constitute the offense therein charged, and that this prosecution is instituted in good faith, and hereby certifies that testimony under oath has been received from the material witness(es) for the offense.

Sworn to and subscribed before me this 10th day of October, 2003.

By: /s/ Donna E. Cercy

[SEAL] Donna E. Cercy
MY COMMISSION
DD163669 EXPIRES
November 7, 2006
BONDED THRU TROY FAIN
INSURANCE, INC.

JIM FULLER, Clerk of the Circuit Court, Fourth Judicial Circuit of Florida, In and For Duval County, and Clerk of the County Court, In and For Duval County, Florida.

FILED THIS OCT 13 2003

BY DEPUTY CLERK: /s/ DP [Illegible]

Dkt		AD		
Ext.	S	S/W		DOB [Omitted]
Race	Black	Sex	Male	
SSN				

MCL No.(S): S810.02(2)(a), 810.02(2)(b), F1; S812.13(2)(b), 777.04(1), F2

Bond $ _____ Judge's Signature _____

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2003-CF-011912-AXXXX-MA

DIVISION: CR-~~G~~[G?]

STATE OF FLORIDA

vs.

TERRENCE GRAHAM

_____/

MOTION FOR REASONABLE BOND

(Filed Nov. 13, 2003)

COMES NOW the Defendant, TERRENCE GRAHAM, by and through his undersigned attorney and pursuant to Florida Rule of Criminal Procedure 3.130 and Florida Statute 903.011, and moves this Honorable Court to set a reasonable bond in this case and as grounds therefore would show:

1. The Defendant, TERRENCE GRAHAM, is a 16-year-old juvenile.
2. The Defendant has no prior record.
3. The Defendant is charged with two (2) serious crimes, that is robbery and aggravated battery.
4. It appears from the police report and statements taken to date that the Defendant was no more than a lookout in a case where the co-defendants were to sneak in, steal some money, and leave.

5. The victims at the Bono's restaurant where the theft was to take place accosted the two co-defendants and was then struck in the head with a baseball bat by a co-defendant (not the Defendant, TERRENCE GRAHAM).

6. The Defendant lives with his mother at [Home Address Omitted], Jacksonville, Florida 32210 and was attending school at the time of the incident.

7. For whatever reason, the state has seen fit to certify the Defendant and two co-defendants as adults while the individual who actually planned the theft and left the door open at the restaurant will face only juvenile sanctions.

8. The Defendant seems to pose no threat to the community and is genuinely concerned about his charges.

9. The Defendant's family is supportive and he will return to school when and if he is released on bond.

10. In the interim, the Defendant is attending classes while in the Duval County Jail.

11. Based on the Defendant's lack of any criminal history, his minimal involvement in the crime, which got out of hand, an R.O.R. or a low bond with an ankle bracelet would seem to be a reasonable disposition for this motion.

WHEREFORE the Defendant respectfully requests this Honorable Court to grant him an R.O.R., or in

the alternative to grant him a reasonable bond with whatever provisions the Court wishes to place upon his release.

Respectfully Submitted,

Raymond A. David, Jr., P.A.

/s/ Raymond A. David, Jr.
Raymond A. David, Jr., Esquire
Florida Bar No.: 0279501
2002 Southside Blvd, Suite 202
Jacksonville, Florida 32216
(904) 720-0506 Telephone
(904) 720-0344 Facsimile
Attorney for Defendant

[Certificate Of Service Omitted In Printing]

S.A. CASE NO.:
03CF676063AD

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CLERK NO.:
162003CF011912AXXXMA

DIVISION: CRG

STATE OF FLORIDA
vs.
TERRANCE GRAHAM

STATE'S DISCOVERY EXHIBIT AND DEMAND FOR RECIPROCAL DISCOVERY

(Filed Nov. 19, 2003)

This response meets the requirements of Rule 3.220(b), Florida Rules of Criminal Procedure, and provides answers in the same order as required by the Rule. The State demands reciprocal discovery as required by Rule 3.220(d), Florida Rules of Criminal Procedure.

A. All court reporters used in depositions and prior sworn statements in this cause, and all witnesses whose names are brought out in depositions.

CATEGORY A:

Paul Diblasi, [Home Address Omitted], Jacksonville, Florida 32223
Carrie Palcic, [Home Address Omitted], Jacksonville, Florida 32258

Toni Adeeb, [Home Address Omitted], Jacksonville, Florida 32207
Kenny McKee, [Home Address Omitted], Jacksonville, Florida 32256
Ofc. D.E. Espie, #7906, Jacksonville Sheriff's Office
Det. L.S. Baker, #5707, Jacksonville Sheriff's Office
Det. Copeland, #6070, Jacksonville Sheriff's Office
C. Morgan, II, #7336, Jacksonville Sheriff's Office
Det. Paul, #6097, Jacksonville Sheriff's Office

CATEGORY B:

Sgt. J.E. York, #6736, Jacksonville Sheriff's Office
Sgt. L.V. Schmitt, #5174, Jacksonville Sheriff's Office
Ofc. R.K. Williams, #6205, Jacksonville Sheriff's Office
Ofc. V.L. Wright, #6370, Jacksonville Sheriff's Office
Ofc. S.D. Lindsey, #7188, Jacksonville Sheriff's Office
C.B. Johnson, #5427, Jacksonville Sheriff's Office (Evidence Technician)

B. All statements brought out at depositions, if taken in this cause. Any statements contained on the arrest docket and all police reports.

*C. All statements brought out at depositions, if taken in this cause. Any statements by the accused on the arrest docket and all police

reports. All statements by Defendant in the Defendant's written statement. Defendant stated that Marcus Harris called him on a cell phone and told him to wait five minutes after he and his father (manager) left the building to come in. Graham stated that Harris bragged that the business had made a lot of money that night.

D. All statements made by Brandon Johnson in his written statements and in police reports. All statements made by Marcus Harris in his written statement and in police reports. All statements made by Terrance Graham in his written statement and in police reports.

Co-Defendant Yusef Gudmalin stated that Graham and Johnson called him and asked him for a ride. Once inside his vehicle, Graham and Johnson told him that they were going to "do a lick." Defendant stated that he told Graham and Johnson that he expected them to compensate him for the ride by paying for some "gold and pipes" for his vehicle. Defendant stated that he drove them to the Bono's. Defendant stated that he left the scene briefly but returned and picked up Graham and Johnson after the offense was committed. Defendant stated that he knew what he did was wrong and he had no idea that they were going to hurt anyone.

Co-Defendant Brandon Johnson admitted that he, along with Graham, entered the Bono's restaurant wearing masks through a rear door that was left opened by Harris.

Defendant stated that he hit Paul Diblasi in the head with the pipe because Diblasi "wouldn't give it up." When asked what that meant, Defendant stated "the money." Defendant stated that he, Harris, and Graham had been planning the robbery for several weeks. Defendant stated that they were driven to the Bono's by a friend named Yusef Goodman [sic] (asian male at Wolfson High School). Defendant stated that Goodman [sic] waited in the parking lot during the offense and drove Defendant and Graham away after the offense.

Co-Defendant Marcus Harris stated, "I knew they were going to rob the place. I didn't know they were going to hurt the man." Harris stated that he talked with Terrance Graham and Brandon Johnson the morning of the offense. Harris stated that he was to make sure that the door was left open and that Graham and Johnson were going to come in and rob the business just after closing hours. Harris stated [t]hat Graham and Johnson had been in the business on prior occasions near closing hour and had commented on the business being short staffed late at night. Harris stated that he was going to get a "cut" of whatever Graham and Johnson got from the intended robbery. Harris stated that on the night of the offense, he left the rear door unlocked to the business. Harris stated that Graham and Johnson assured him that no weapon would be used. Harris stated that he even had second thoughts about leaving the door open

because he knew what he was doing was wrong and his father is also a manager at the business. Harris stated that he knew both Johnson and Graham for over two years.

E. None known to the State at this time.

*F.

G. None known to the State at this time.

H. None known to the State at this time.

*I. Yes, no documents.

*J. Any statements brought out at depositions.

*K. Photos, maps, charts, diagrams, evidence technician report, Brandon Johnson's constitutional rights form and written statement, Terrance Graham's constitutional rights form and written statement, Yusef Gudmalin's constitutional rights form and written statement, Marcus Harris' constitutional rights form and written statement, steel bar, VHS video, court records and supporting documents.

3.220(b)(4) Brady. None known to the State at this time.

* Defense may inspect, copy, test or photograph items contained in these paragraphs by appointment.

[Certificate Of Service Omitted In Printing]

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 03 CF 11912 AXXX

DIVISION: CR-C

STATE OF FLORIDA

vs.

Terrance Graham

CHECK AND INITIAL APPLICABLE CONDITIONS OF PROBATION

(Filed Dec. 18, 2003)

PLEA OF GUILTY AND NEGOTIATED SENTENCE AND WAIVER OF RIGHTS AND SENTENCING PROCEDURES UNDER §985.233, FLORIDA STATUTES

(Juveniles Sentenced as Adults)

I hereby enter my plea of guilty to ~~Armed~~ [/s/ RD/TG] Armed Burglary & Att ~~Armed~~ [/s/ RD/TG] Armed Robbery for the reason that I am guilty. Before entering such plea(s) of guilty I was advised of the nature of the charge(s) against me, the statutory offenses included within such charge(s), the range of allowable punishments thereunder, the possible defenses to the charge(s), circumstances in mitigation thereof, and all other facts essential to a broad understanding of the charge(s) against me.

I. FREE AND VOLUNTARY NEGOTIATED SENTENCE

✓ I understand Adjudication of Guilt will be withheld.

____ I understand I will be Adjudicated Guilty.

I understand I will be sentenced to 3 yrs community control/probation. I understand that all of the standard conditions of probation or community control will apply along with the special conditions checked below:

A. ✓ I will serve 12 months in the Pre-Trial Detention Facility with credit for time served. I will be entitled to good and gain time. While in jail, I will participate in all programs and follow all rules as directed by Jail staff. While in the Pre-Trial Detention Facility I will:

1. ✓ Be evaluated by qualified educators to determine my educational level. Based upon this evaluation, I will be enrolled in the appropriate educational program as directed by my probation officer and educators. My educational progress will be monitored and I will continue to follow the course directed. I will attend class on a regular basis. I will obey all rules of my educators and will not disrupt any class.

2. ✓ Attend and participate in additional classes directed by the Jail staff, including but not limited to Conflict Resolution and Living Skills Classes.

3. ____ Be evaluated for substance abuse. If deemed appropriate, I will participate in a substance abuse education and information program and/or the Substance Abuse Treatment Program housed in the Pre-Trial Detention Facility.

B. Upon release from the Pre-Trial Detention Facility, I will:

1. ____ Attend regular meetings of Narcotics or Alcoholics Anonymous, as directed by my Probation Officer.

2. ____ Complete the aftercare portion of the Substance Abuse Treatment Program, including residential treatment if deemed appropriate and as directed by my Probation Officer. I will maintain all house rules if living in a recovery residence.

3. ____ Submit to random urinalysis as directed by my Probation Officer and/or my treatment facility.

4. ____ Be evaluated and, if necessary, will complete any appropriate psychological counseling, including successful completion of the Case Management Program.

5. ✓ Continue to participate in enhancement classes as directed by my Probation Officer, including but not limited to Anger Control, Living Skills, and Drug Education classes.

6. ____ Bear the reasonable cost of any individualized aftercare treatment.

7. ✓ Based upon the evaluation of my educational level and my progress while incarcerated, continue my studies at the prescribed educational level. My progress will be monitored by my Probation Officer and I will continue to follow the course directed. I will not have any unexcused absences from class.

8. ✓ Not commit any violations of the Duval County School Conduct Code.

9. ✓ Give my best effort to make passing grades, or satisfactorily progress with my prescribed educational program.

10. ✓ Participate in a designated mentorship program as directed by my Probation Officer.

11. ✓ Obtain lawful employment after school. If I am unable to obtain lawful employment, I will supply to my probation officer the names, addresses and phone numbers of persons/entities from whom I have sought employment every week until I obtain employment.

12. ✓ Perform 100 hours of community service as directed by my Probation Officer.

13. ✓ Obey all reasonable commands of my parent or guardian.

14. ✓ Abide by a 10:00 P.M. daily curfew, or up to midnight if required by employment. I will not leave my residence any earlier than 6:00 A.M. after following my curfew.

15. ____ Pay $ 0 restitution to the victim(s). [—no restitution owed to victim]

16. ✓ Pay $ 276.00 court costs.

17. ✓ CREDIT 101 DAYS TIME SERVED.

18. ____ _____

II. ADVISED RIGHTS

I understand that by pleading guilty I give up the constitutional right of trial by Judge or jury, the right to remain silent, the right to put on witnesses on my own behalf, the right to confront the witnesses against me, and on the charges to which I have pleaded guilty, I give up the right against self-incrimination.

III. READ AND EXPLAINED BY MY ATTORNEY

My attorney and I have read this plea of guilty and waiver of Chapter 985 rights form together in private. My attorney has explained all parts to my complete satisfaction and understanding. We have fully discussed all aspects of this case and my attorney has, to my complete satisfaction answered all of my questions and has fully explained my rights and the charges against me.

I am satisfied with the service my attorney has rendered in this case in my behalf.

IV. WAIVER OF RIGHTS AND SENTENCING PROCEDURES UNDER §985.233, FLORIDA STATUTES

A. I understand that I have the right to be sentenced under §985.233, Florida Statutes, which provides for special considerations by the Court because I am a Juvenile.

B. **I HEREBY WAIVE AND GIVE UP THIS RIGHT** and I understand that I am being sentenced as an adult.

C. I am knowingly, freely and voluntarily waiving any requirement of §985.233, after a thorough discussion of my rights with my attorney. The reason that I have entered into a negotiated sentence with the State of Florida to be sentenced as an adult is because it is the best thing for me to do.

D. My attorney has advised me that the Court is required to receive and consider a presentence investigation report and to hold a hearing regarding the suitability of adult or juvenile sanctions. The Court must give all parties present an opportunity to comment at the hearing. The parties include, if present: my parent(s) or guardian(s), my attorney, the State Attorney or Assistant State Attorney, representatives of the Department of Juvenile Justice, the victim(s), representatives of the school

system and law enforcement officers involved in the case. **I HEREBY WAIVE AND GIVE UP THE RIGHT TO THIS PRESENTENCE INVESTIGATION AND THIS HEARING.** [/s/ RD/TG]

E. My attorney has advised me that the suitability or non-suitability for adult sanctions is determined under §985.233, by the Court before any other determination or disposition based upon the following criteria:

1. The seriousness of the offense to the community and whether the community would best be protected by juvenile or adult sanctions;

2. Whether the offense was committed in an aggressive, violent, premeditated, or willful manner;

3. Whether the offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted;

4. The sophistication and maturity of the child, as determined by consideration of his home, environmental situation, emotional attitude, and pattern of living;

5. The record and previous history of the child including:

   a. Previous contacts with HRS, the Department of Juvenile Justice, the Department of Corrections, the Department of Children and Family

Services, law enforcement agencies, and the courts,

b. Prior periods of probation or community control,

c. Prior adjudications that the child committed a delinquent act or a violation of law as a child, and

d. Prior commitments to the Department of Juvenile Justice, HRS, the Department of Children and Family Services, or other facilities or institutions;

6. The prospects for adequate protection of the public and the likelihood of deterrence and reasonable rehabilitation of the child if he is assigned to juvenile services and facilities.

7. Whether the Department of Juvenile Justice has appropriate programs, facilities and services immediately available;

8. Whether adult sanctions would provide more appropriate punishment and deterrence to further violations of the law than the imposition of juvenile sanctions. **I HEREBY WAIVE AND GIVE UP THE RIGHT TO CONSIDERATION OF THESE FACTORS.**

F. **I HEREBY WAIVE AND GIVE UP THE RIGHT TO ANY WRITTEN FINDINGS, PURSUANT TO §985.233.**

V. TIME FOR CONSIDERATION AND REFLECTION

I have had sufficient time to consider the charge(s) against me, the possible defenses, the advice of my attorney, my waiver of constitutional rights and rights as a juvenile resulting from my plea(s) and to reflect upon the consequences of my plea(s). I do not need more time for consideration and reflection and I wish to proceed with my plea(s) of guilty and waiver of rights at this time.

VI. ACKNOWLEDGED TO THE JUDGE

In Open Court I have told the Judge that:

A. I understand this plea of guilty and waiver of Chapter 985 rights form and all the rights I am giving up by pleading guilty and agreeing to be sentenced as an adult, and that

B. I am not under the influence of any drug or substance or condition which interferes with my understanding and appreciation of this plea and waiver and the consequences of it, and that

C. I have entered into and signed this plea of guilty, negotiated sentence and waiver of rights freely and voluntarily, because I want to plea and give up my rights, and that

D. This plea of guilty, negotiated sentence and waiver of rights form is true and correct.

Both my attorney and I have signed this plea and waiver of Chapter 985 rights form, and explanation of my rights in Open Court, at Jacksonville, Duval County, Florida on December 18 ~~19~~ 2003.

/s/ Terrance Graham
Defendant

/s/ P. Johnson
Assistant State Attorney

/s/ Gail R. Cole
Witness, Deputy
Clerk of Court

My signature as the Defendant's attorney is certification that I have explained the Defendant's negotiated sentence to him in detail. I have also explained each of the rights to the defendant that he is waiving by agreeing to this adult sentence.

/s/ Ray David
Attorney for the Defendant

My signature as Judge of this Court is certification that I have gone over this plea form and waiver of Chapter 985 rights with the Defendant in open court and have asked (him/her) questions, heard the responses and observed (his/her) demeanor. I find the Defendant has the intelligence to understand (his/her) constitutional rights, the plea(s), the waiver, this form and these proceedings. I further find the plea(s) and waiver of Chapter 985 rights has been entered knowingly, voluntarily and freely and that

the Defendant is not under the influence of any medication, drug, substance or condition that would interfere with (his/her) understanding and appreciation of the plea(s) and waiver and consequences of them.

/s/ Peter L. Dearing
Circuit Judge

IN THE CIRCUIT COURT,
FOURTH JUDICIAL
CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NUMBER:
16 2003 CF 11912 A XXX MA

DIVISION: CR-C

STATE OF FLORIDA

-vs-

Terrance Jamar Graham,

DEFENDANT.

CERTIFICATION OF MINOR AS AN ADULT

(Filed Dec. 18, 2003)

The Defendant, Terrance Jamar Graham, having been transferred for criminal prosecution pursuant to Chapter 39 of the Florida Statues [sic], other than by voluntary waiver, and having been found on the 18 day of December, ~~19~~2003, to have committed the offfense for which he was transferred or a lessor included offense, to-wit: Armed Burglary with Assault or Battery, and Attempted Armed Robbery.

HEREAFTER, the said Terrance Jamar Graham shall be handled in every respect as if he were an adult for any violation of Florida law committed subsequent to the 18 day of December, ~~19~~2003.

/s/ Peter L. Dearing
CIRCUIT JUDGE

Copies to:

Identification Section, JSO
Crime Analysis, JSO
State Attorney's Office, Juvenile Division
State Attorney's Office, Circuit Division
Duval Regional Detention Center
1241 East 8th Street
Jacksonville, Florida 32206
Attn: Vince Koch

Clerk of the Circuit Court
6/89

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO: 2003-11912-CFA.

DIVISION: CR-C.

STATE OF FLORIDA

VS.

TERRANCE GRAHAM

(Filed Jul. 11, 2006)

Proceedings before the Honorable Peter L. Dearing, on Thursday, December 18, 2003, at the Duval County Courthouse, 330 East Bay Street, Jacksonville, Florida, Courtroom 4, before Karen F. Howard, Registered Professional Reporter and Notary Public in and for the State of Florida at Large.

Official Reporters, Inc.
201 East Adams Street
Jacksonville, Florida 32202
(904) 358-2090

[2] APPEARANCES

PAMELA A. JOHNSON, Esquire

Assistant State Attorney
Office of the State Attorney
Duval County Courthouse
330 East Bay Street
Jacksonville, Florida 32202

Appearing for the State of Florida.

RAY DAVID, Esquire

Appearing for the Defendant.

[3] PROCEEDINGS

– – –

MS. JOHNSON: Your Honor, the state would call Terrance Graham on the middle of page six with Mr. David.

MR. DAVID: Your Honor, his parents are coming forward. He's also a juvenile.

THE COURT: All right.

(Defendant present.)

THE COURT: The mother and father here; is that right?

MR. DAVID: Yes, sir.

THE COURT: Okay.

MR. DAVID: Your Honor, in case 03-CF-11912, we have reached a disposition. I won't go into the histrionics that led to it, but at this time Mr. Graham's authorized me to withdraw his previous pleas of not guilty and, as to both charges in the information, enter pleas of guilty as charged.

It's my understanding the state will—the agreement is that he will be placed on three years probation; adjudication of guilt will be withheld in each case; the sentences will run concurrently; and

one of the special [4] conditions is he serve 12 months in the Duval County Jail. He has credit for 101 days.

Also his sentence is very similar to the last gentleman's. He has 100 hours of community service once he gets out, $276 in court costs.

He understands he's—he has no prior record of any sort, so he does understand his rights he's giving up with no PSI. He understands that he is being sentenced as an adult, and he is ready to go forward today with sentencing.

THE COURT: Do we have a waiver of presentence investigation report form?

MR. DAVID: I believe it's right in that document right there. I did a separate one, and it's on page three, I believe. I circled it and had him initial it and I initialed it.

THE COURT: All right.

(The defendant was sworn by the clerk.)

THE COURT: Tell me your full name, please.

THE DEFENDANT: Terrance Jamar Graham.

THE COURT: How old are you, Mr. Graham?

THE DEFENDANT: 16.

[5] THE COURT: And how far have you gone in school?

THE DEFENDANT: 9th grade.

THE COURT: Can you read and understand English?

THE DEFENDANT: Yes, sir.

THE COURT: Did you read and understand everything on this form entitled plea of guilty and negotiated sentence and waiver of rights and sentencing procedures under section 985.233 Florida Statutes?

THE DEFENDANT: Yes, sir.

THE COURT: And is this your signature that appears on the middle of the fourth page?

THE DEFENDANT: Yes, sir.

THE COURT: Is everything on this form true and correct?

THE DEFENDANT: Yes, sir.

THE COURT: And do you have any questions about it?

THE DEFENDANT: No, sir.

THE COURT: Are you pleading guilty to these two charges because you did commit these crimes?

THE DEFENDANT: Yes, sir.

[6] THE COURT: Has anyone threatened you or coerced you or promised you anything other

than what's on this form to cause you to enter these pleas today?

THE DEFENDANT: No, sir.

THE COURT: And do you understand that by pleading guilty you're giving up your right to a trial, the right to remain silent, the right to present witnesses in your own behalf, the right to confront witnesses against you, the right to require the state to prove these charges, and the right against self-incrimination?

THE DEFENDANT: Yes, sir.

THE COURT: Do you also understand that if you're not a United States citizen these pleas may cause you to be deported?

THE DEFENDANT: Yes, sir.

THE COURT: And finally do you understand that the charges to which you are entering your guilty pleas, at least one of which is a first-degree felony, which is punishable by up to 30 years in prison if you violate this probation?

THE DEFENDANT: Yes, sir.

[7] THE COURT: Have you had enough time to discuss this case with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: And are you satisfied with his representation of you?

THE DEFENDANT: Yes, sir.

THE COURT: Have you had enough time to think about this charge—or these charges, any defenses you might have to them, and the consequences of these pleas?

THE DEFENDANT: Yes, sir.

THE COURT: Are you today under the influence of any drugs or alcohol or medication?

THE DEFENDANT: No, sir.

THE COURT: Do you also understand that because of your age that you are being sentenced as an adult and you are therefore giving up your right to have the court consider the imposition of juvenile sanctions?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. David, will you stipulate to a factual basis?

MR. DAVID: Yes, sir, we would.

Your Honor, there's no minimum in this. [8] The alleged weapon was a baseball bat one of the individuals had, so it's not a firearm or a knife.

THE COURT: All right. That explains the confusion I had in the prior case.

MS. JOHNSON: I apologize for not making that clear.

THE COURT: I will find that your pleas of guilty to counts one and two are freely and voluntarily entered. I will find from the record that there's a factual basis to accept those pleas. I will withhold adjudication of guilt, concurrently on each of these two charges place you on probation for a period of three years under the standard conditions of probation, with a special condition that you serve 12 months in the Duval County Jail with 101 days credit. Those two jail terms are to run concurrent, each with the other.

As further special condition of the probation, you'll be required to participate in the educational programs as directed by your probation officer and/or the jail personnel.

You'll be required to participate in [9] additional classes such as conflict resolution/living skills classes as directed by the jail staff and/or your probation officer and enhancement classes as directed by your probation officer.

You'll be required to submit to an educational evaluation and complete any educational programs that are directed by the jail personnel and by your probation officer.

You may not commit any violations of the Duval County school conduct code.

You'll be required to exercise your best efforts to obtain passing grades or satisfactorily progress through the prescribed educational program.

You may be required to participate in a designated mentorship program.

You may be required to obtain lawful employment after school or exercise your best efforts to obtain lawful employment.

You'll be required to perform 100 hours of community service at a minimum rate of five hours per month.

You'll be required to obey all reasonable commands of your parents or guardian.

[10] You'll be required to abide by a curfew from 10 p.m. at night to 6 o'clock in the morning. Such curfew may be relaxed in some respects by your probation officer to accommodate a work schedule.

There is no restitution to be ordered. You'll be required to pay court costs of $276.

MR. DAVID: Your Honor, may I add one thing?

THE COURT: Sure.

MR. DAVID: He has an opportunity—apparently he's a pretty good football player, and he has an opportunity to play at one of the local private schools. Could we—does the court have any objection to work and/or school activities. Like if he has a football game and it goes to 10:30, obviously he would be in violation, if he—that's all, just work and/or school activities; I think that would be fine.

THE COURT: I don't have any objection to that, but he's still going to need his probation officer's permission.

MR. DAVID: Yes, sir, that's fine.

THE COURT: All right. Mr. Graham, you [11] would have 30 days from today's date to appeal that disposition if you think that is illegal, but your pleas of guilty waive your right to appeal any other issue.

Do you need his fingerprints?

THE CLERK: No.

THE COURT: Okay. You'll need to step over to your right and speak to probation officer.

MR. DAVID: Thank you, sir.

(Proceedings concluded.)

[Certificate Omitted In Printing]

Circuit Court, Fourth Judicial Circuit of Florida
State of Florida v. Terrance Jamar Graham

(Filed Dec. 18, 2003)

RULE 3.992(a) CRIMINAL PUNISHMENT CODE SCORESHEET

1. DATE OF SENTENCE	2. PREPARER'S NAME	3. COUNTY	4. SENTENCING JUDGE
12/18/03	☐ DC ☒ SAO	Duval	Hon P Dearing

5. NAME (LAST, FIRST, M.I.)	6. DOB	8. RACE	10. PRIMARY OFF. DATE	12. PLEA
Graham, Terrance J.	[Date Of Birth Omitted]	☒ B ☐ W ☐ OTHER	7-18-03	☒ TRIAL ☐
	7. DC #	9. GENDER ☒ M ☐ F	11. PRIMARY DOCKET # 03CF11912AXXX	

I. **PRIMARY OFFENSE:** If Qualifier, please check __A __S __C __R
(A=Attempt, S=Solicitation, C=Conspiracy, R=Reclassification)

Felony Degree	F.S.#	Description	Offense Level	**Points**
1ST PBL	810.02(2)B /	Armed Burglary	8	

(Level – Points: 1=4, 2=10, 3=16, 4=22, 5=28, 6=36, 7=56, 8=74, 9=92, 10=116)

Prior capital felony triples Primary Offense points ☐ **I.** 74.0

II. **ADDITIONAL OFFENSE(S):** Supplemental page attached ☐

Docket #	FEL/MM Degree	F.S.#	Offense Level	Qualify A S C R	Counts	Points	Total
/	2° /	812.13(2)a/	8	☐ ☐ ☐ ☐	1	x 37	= 37
Description	Attempted Armed Robbery						
/	/	/	/	☐ ☐ ☐ ☐		x	=
Description							
/	/	/	/	☐ ☐ ☐ ☐		x	=
Description							

(Level – Points: M=0.2, 1=0.7, 2=1.2, 3=2.4, 4=3.6, 5=-5.4, 6=18, 7=28, 8=37, 9=46, 10=58)

Prior capital felony triples Additional Offense points ☐ Supplemental page points _____

II. _____

III. **VICTIM INJURY:**

		Number	Total			Number	Total
2nd Degree Murder	240X		=	Slight	4X		=
Death	120X		=	Sex Penetration	80X		=
Severe	40X		=	Sex Contact	40X		=
Moderate	18X		=				

III. _____

IV. **PRIOR RECORD:** Supplemental page attached ☐

FEL/MM Degree	F.S #	Offense Level	Qualify A	S	C	R	Description	Number	Points		Total
____/	____/	____/	☐	☐	☐	☐	____/	____	x ____	=	____
____/	____/	____/	☐	☐	☐	☐	____/	____	x ____	=	____
____/	____/	____/	☐	☐	☐	☐	____/	____	x ____	=	____
____/	____/	____/	☐	☐	☐	☐	____/	____	x ____	=	____
____/	____/	____/	☐	☐	☐	☐	____/	____	x ____	=	____
____/	____/	____/	☐	☐	☐	☐	____/	____	x ____	=	____

(Level - Points: M=0.2, 1=0.5, 2=0.8, 3=1.6, 4=2.4, 5=3.6, 6=9, 7=14, 8=19, 9=23, 10=29)

Supplemental page points ____

IV. ____

V. Legal Status violation = 4 Points **V.** ____

VI. Community Sanction violation before the court for sentencing **VI.** ____

6 points x each successive violation OR

New felony conviction = 12 points x each successive violation

VII. Firearm/Semi-Automatic or Machine Gun = 18 or 25 Points **VII.** ____

VIII. Prior Serious Felony = 30 Points **VIII.** ____

Subtotal Sentence Points ____

IX. Enhancements (only if the primary offense qualifies for enhancement)

Law Enforcement Protection	Drug Trafficking	Grand Theft Motor Vehicle	Street Gang	Domestic Violence (offenses committed on or after 10-1-97)
___ x 1.5 ___ x 2.0 ___ x 2.5	___ x 1.5	___ x 1.5	___ x 1.5	___ x 1.5

Enhanced Subtotal Sentence Points **IX.** ____

TOTAL SENTENCE POINTS 111.0

SENTENCE COMPUTATION

If total sentence points are less than or equal to 44, the lowest permissible sentence is any *non-state prison sanction*.

If total sentence points are greater than 44:

111.0	minus 28=	83	x .75 =	62.25
total sentence points				lowest permissible prison sentence in months

The maximum sentence is up to the statutory maximum for the primary and any additional offenses as provided in s. 775.082, F.S., unless the lowest permissible sentence under the code, exceeds the statutory maximum. Such sentences may be imposed concurrently or consecutively. If total sentence points are greater than or equal to 363, a life sentence may be imposed.

Life
maximum sentence
in years

TOTAL SENTENCE IMPOSED

		Years	Months	Days
☐ State Prison	☐ Life			
☐ County Jail	☐ Time Served			
☐ Community Control				
☐ Probation				

Please check if sentenced as ☐ habitual offender, ☐ habitual violent offender, ☐ violent career criminal, ☐ prison releasee reoffender, or a ☐ mandatory minimum applies.

☐ Mitigated Departure ☐ Plea Bargain

Other Reason _____

JUDGE'S SIGNATURE	/s/ Peter L. Dearing

In the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida

Case No.:
16-2003-CF-11912-AXXX-MA
Division: **CR-C**

State of Florida

vs.

TERRANCE JAMAR GRAHAM

Defendant

ORDER OF PROBATION
(Certified Juvenile)

(Filed Jan. 7, 2004)

This cause coming on this day to be heard before me, and the Defendant being present, and having entered a

Plea of Guilty
to/of the offense(s) of

Armed Burglary with Assault or Battery (Count 1) and Attempted Armed Robbery (Count 2),

Judgment

___ The Court hereby adjudges you to be guilty of the above offense(s).

X The Court withholds adjudication of guilt.

Sentence

Now therefore, it is ordered and adjudged that you will be placed on Probation for a period of **3 years** under the supervision of the Department of Corrections, subject to Florida law.

_X_ It is further ordered and adjudged that you be

___ committed to the Department of Corrections

_X_ confined in the County Jail

for a term of **12 months with credit for 101 days jail time** as a condition of Probation.

It is further ordered that you shall comply with the following conditions of Probation during the Probation period:

(1) Not later than the 5th day of each month, you will make a full and truthful report to your Officer on the form provided for that purpose.

(2) You will not change your residence or employment or leave the county of your residence without first procuring the consent of your Officer.

(3) You will not possess, carry, or own any firearm. You will not possess, carry, or own any weapon without first procuring the consent of your Officer.

(4) You will live without violating any law. A conviction in a court of law shall not be

necessary in order for such a violation to constitute a violation of your Probation.

(5) You will not associate with any person engaged in any criminal activity.

(6) You will not use intoxicants to excess or possess any drugs or narcotics unless prescribed by a physician. Nor will you visit places where intoxicants, drugs, or other dangerous substances are unlawfully sold, dispensed or used.

(7) You will work diligently at a lawful occupation, advise your employer of your probationary status, and support any other dependents to the best of your ability, as directed by your Officer.

(8) You will promptly and truthfully answer all inquiries directed to you by the Court or your Officer, and you will allow your Officer to visit in your home, at your employment site, or elsewhere, and you will comply with all instructions your Officer may give you.

(9) You will perform **100** hours of community service at the rate of not less than **5** hours per month as directed by your Officer.

(10) You will be subject to random urinalysis at the discretion of your Officer. You will pay the reasonable costs of such testing.

(11) You will pay the following monetary obligations (plus a 4 percent surcharge) to the Department of Corrections, as directed

by your Probation Officer by and through the Department of Corrections:

Restitution in the amount of **-0-**.

Felony court costs in the amount of **$200.00**, **$50.00** to the Crimes Compensation Trust Fund, **$3.00** to the Department of Revenue for the Additional Court Cost Clearing Trust Fund, **$20.00** for the Crime Stoppers Trust Fund, **$3.00** for deposit in the Duval County Teen Court Trust Fund, and, if your offenses involve illegal drugs, **$100.00** for the FDLE Trust Fund.

Cost of supervision at the rate of **$40.00** for each month of supervision. The monthly cost of supervision shall be waived for the number of months or portion of a month you are in the Duval County Jail. The monthly cost of supervision amount shall be waived for the number of months or portion of a month you are continuously enrolled in school.

The total amount due for all monetary obligations plus a 4 percent surcharge, shall be paid in accordance with the priority schedule established by Administrative Order 94-22, issued by the Chief Judge of the Fourth Judicial Circuit.

All monetary obligations of your Probation will be paid in regular monthly installments amortized over the term of your Probation with the last payment due no later than 30 days prior to the scheduled termination of your supervision. Failure to meet the payment obligation will be a violation of your Probation.

SPECIAL CONDITIONS

(12) While in the Duval County Jail, you will successfully complete all programs and follow all rules as directed by jail staff. You will be entitled to good and gain time. While in the Duval County Jail, you will:

(a) Be evaluated by qualified educators to determine your education level. Based upon this evaluation, you will be enrolled in the appropriate educational program as directed by your Probation Officer and educators. Your educational progress will be monitored and you will continue to follow the course directed.

(b) Attend class on a regular basis. You will obey all rules of your educators and will not disrupt any class.

(c) Attend and participate in additional classes directed by the jail staff, including but not limited to Conflict Resolution and Living Skills classes.

(13) Upon release from the Duval County Jail, you will:

(a) Continue to participate in enhancement classes as directed by your Probation Officer, including but not limited to Anger Control, Living Skills, and Drug Education classes.

(b) Based upon the evaluation of your educational level and your progress while incarcerated, continue your studies

at the prescribed educational level. Your progress will be monitored by your Probation Officer, and you will continue to follow the course directed. You will not have any unexcused absences from class.

(c) Not commit any violations of the Duval County School Conduct Code.

(d) Give your best effort to make passing grades or satisfactorily progress with your prescribed educational program.

(e) Participate in a designated mentorship program as designated by your Probation Officer.

(f) Obtain lawful employment after school. If you are unable to obtain lawful employment, you will supply your Probation Officer the names, addresses, and phone numbers of persons/entities from whom you have sought employment every week until you obtain employment.

(g) Obey all reasonable commands of your parent or guardian.

(h) Abide by a 10:00 P.M. daily curfew. You will not leave your residence earlier than 6:00 A.M. after following your curfew.

If you have entered a plea of guilty or no contest, or have been convicted or previously convicted in the State of Florida for an offense specified in Section 943.325, Florida Statutes, you are required to submit two biological specimens to the Florida Department of

Law Enforcement. These specimens shall be collected in an approved manner as directed by the Department of Corrections staff within 30 days, unless otherwise directed by the Court.

You are hereby placed on notice that the Court may at any time rescind or modify any of the conditions of your Probation, or may extend the period of Probation as authorized by law, or may discharge you from further supervision. If you violate any of the conditions of your Probation, you may be arrested and the Court may revoke your Probation, adjudicate you guilty if adjudication was withheld, and impose any sentence which it might have imposed before placing you on Probation or require you to serve the balance of said sentence.

It is further ordered that when you have been instructed as to the conditions of Probation, you shall be released from custody if you are in custody, and if you are at liberty on bond, the sureties thereon shall stand discharged from liability.

It is further ordered that the Clerk of the Court file this order in the clerk's office and provide certified copies of same to the officer for use in compliance with the requirements of law.

DONE AND ORDERED this the 18th day of December, 2003.

/s/ Peter L. Dearing
Peter L. Dearing
Circuit Judge

I acknowledge receipt of a copy of this order. The conditions have been explained to me and I agree to abide by them.

Date _____ Probationer _____

Instructed by _____

Original: Clerk of the Court

Copies: Probationer

Florida Department of Corrections
Probation and Parole Services

Circuit Court, Fourth Judicial Circuit of Florida
State of Florida v. Terrance Jamar Graham

(Filed Dec. 8, 2004)

FELONY

First Appearance:	*Continued:*	*Continued:*	*Continued:*	*Continued:*
Continued:	*Continued:*	*Continued:*	*Continued:*	*Continued:*

Arrest And Booking Report
[LOGO] **Jacksonville Sheriff's Office**
Jacksonville Florida

ADJUDICATED an ADULT

Yr: **2004**	*Incident #* **1013187**	*Amend #*
2004047976 [-0] 12/6/2004 13:54		*File Direct:* **NO**
JSO ID #		*Court:* **Circuit**
SSN	*OBTS #*	

Arresting Agency: **Jacksonville Sheriff's Office**

Day/Date/Time Arrested: **Monday 12/6/2004 13:00**

Detention Hearing: **Date: __/__/20__** *Parents Notified:* **Yes __ No __**
Child Placed: **__ Secure Detention __ Home Detention**
Officer's Recommendation: **PROSECUTION**

Name: **GRAHAM, TERRANCE JAMAR**
Aliases:
Nickname(s): **B.J.**

Sub-Sector of Arrest: **A3**
Sub-Sector of Residence: **G2**
OC deployed prior to/during Arrest: **NO**

Subject's Home Address: [Home Address Omitted] *Apt./Lot #:*
City: **JACKSONVILLE** *State:* **FLORIDA** *Zip:* **32207**
Race: **BLACK** *Sex:* **Male** *DOB:* [Date Of Birth Omitted] *Age:* **17** *Eye Color:* **BROWN**
Hair Color: **BLACK** *Complexion:* **DARK** *Height:* **5'6"** *Weight:* **165** *Build:* **Thin**
Drivers License # **[Omitted]** *State:* **FLORIDA** *Subject's Resident Type:* **CITY**
Hm Phone # **[Omitted]** *Bus. Phone #* **[Omitted]** *Phone Ext.* *How long in Jax.* **17 yrs**
Subject's Residence Status: **RESIDENT** *Armed With:*
Distinguishing Marks: *Arrest Made On:* **CALL**
Employer: **NONE** *Place of Birth:* **JACKSONVILLE DUVAL FLORIDA**
School Last Attended: **WOLFSON H.S.** *US Citizen:* **YES**

Domestic Violence Involved: **NO** *Children under 18 Present:* *If No is it Domestic Related:* **NO**

Day/Date/Time of Incident-From: **Monday 12/6/2004 12:00**
Day/Date/Time of Incident-To: **Monday 12/6/2004 12:30**
Incident Address: **500 ADAMS ST E** *Apt./Lot #:*
Offense Location Type: **Jail/Prison** *Interviewed by:*
Where Arrested: **500 ADAMS ST E** *Apt./Lot #:*
Is Incident Gang Related: **NO**
Involved in Traffic Accident: **NO** *Injuries from Accident:*
Is Arrestee a Gang member? **NO**

Statute or Ordinance Number(s):

#1 *Statute No:* **S948.06** *Degree:* **N/A** *UCR Code:* **9000** *Attempt Code:* **Commit** **12/6/2004-13:22**
VIOLATION OF PROBATION OR COMMUNITY CONTROL [Burglary/Robbery]

Citation #	*SA#* **2003-11912**
Capias/Warrant # **J25706**	*Case #* **2003-11912**

Warrant Type: **Other Warrant**
No. of Counts: **1**

Jurisdiction: **Jacksonville Sheriff's Office** *CT Location/Div.:* **DUVAL COUNTY/C**
Bond Amount: **$.** *Date of Issue:* **12/6/2004** *Date of Return:* *Judge:* **UNKNOWN**
Disposition: **[None]** **[03-676063 CRC]** *Disposition Date:*

Blanket Bond:

ADDITION INFORMATION **1** *Reporting Officer:* **E.K.STALLWORTH 7733**

OFFENDER TERRANCE GRAHAM WAS PLACED ON PROBATION FOR 3 YEARS ON 12/18/2003 IN DUVAL COUNTY CASE NUMBER 2003-11912 FOR THE OFFENSE OF BURGLARY/ROBBERY. TERRANCE GRAHAM WAS ARRESTED BY OFFICER STALLWORTH OF THE JACKSONVILLE SHERIFFS OFFICER FOR THE NEW OFFENSE OF HOME INVASION ROBBERY AND FLEE/ATTEMPT TO ELUDE ON 12/6/2004. GRAHAM IS A THREAT TO THE COMMUNITY AND THIS NEW ARREST IS GROUNDS FOR THE BELIEF HE HAS VIOLATED HIS CURRENT PROBATION SUPERVISION.

Transported By:
E.K.STALLWORTH #7733

Approving Supervisor:
E.K.STALLWORTH #7733

Arresting Officer(s) #1:
E.K.STALLWORTH #7733

#2: **#0**

Div/Zone or Unit: **OTHER PTDF**

# of Cases Cleared:

State of Florida, County of Duval

Arresting/Transporting Officer's Signature:
/s/ E.K. Stallworth #7733

Sworn to (or affirmed) and subscribed before me this 6 *day of* Dec, 2004, *by*
Personally Known ✓ *or Produced Identification* ___ *Type of Identification produced:* _____

[Illegible]
Print, Type, or Stamp, Commissioned name of Notary Public

[Illegible]
Signature of Notary—State of Florida Certified Law Enforcement Officer or Corrections Officer:

Investigative Time:

#1 ***Hours:*** **0** ***Minutes:*** **30** ***Cost Amount:*** **$7.23**

Drug Activity: **NOT APPLICABLE** *Drug Type:* **NOT APPLICABLE**
Alcohol Related: **UNKNOWN (OR N/A)** *Drug Related:* **UNKNOWN (OR N/A)**

Juvenile Information: *Lives With:* **Father**
Name: **JONES, HARRY**
Home Address: **[Home Address Omitted] T** *Apt./Lot #:*
City: **JACKSONVILLE** *State:* **FLORIDA** *Zip:* **32207**
Home Phone # **[Omitted]** *Bus. Phone #* *Phone Ext.*
Officer's Immediate Disposition: **Incarcerated (County jail)**
Officer's Recommendation: **PROSECUTION**
Parents Notified: **No** *Date\Time Notfied:* **00:00** *Method:*

Is Juvenile SHO? **No** *SHO Verified?* **No** *Verified By:*

Drug Violation? **No** *Crime Against Property?* **Yes** *Crime Against Person?* **No**
Weapon Type:
How Victim was Assaulted:

Jail Information (Back Door) *Date and Time Admited* [sic]: **12/6/2004 13:54**
Jail # **2004047976** *Juvenile/Court Clerk #*

Triage Questions:
Involved in Traffic Accident: **NO** *Injuries from Accident:*
OC deployed prior to/during Arrest: **NO** *Was a hobble restraint used on the arrestee?* **NO**
Does the arrestee exhibit any signs of suicidal behavior or attempts? **NO**
Does the arrestee have any observable medical/mental health problems? **NO**
Has the arrestee shown any escape potential or violence propensity behaviors? **NO**
Is there any other information about the arrestee that jail personnel need to know? **NO**
If yes, what?

Part II of Arrest And Booking Report:

Arrestee Personal Information:

Special Needs:

SOCIAL SECURITY #	*OBTS #*
Corrected Name of Suspect:	*Corrected DOB:*
Place of Birth: Jax, FL	*Religion:* Christian
Height: *Weight:* *Build:*	*Defense Attorney:* None
Marital Status: Single	*Length of Present Emploment* [sic]: *Yrs.* 0 *Months* 0
Education (# of years) 10 yrs	*Occupation:* student—Wolfson
Employer: Unemployed	*How long in Jax.* 17 yrs *Local Prior Arrests:* yes
Employer Address:	

Next of Kin. Name:	*Relationship:*
Next of Kin Address & Ph #:	

Admission Officer ID #: **J.A.WOOD #7207**	*Searching Officer ID #:*
Property Officer ID #:	*Fingerprinting Officer ID #:*

AGENCY:
LOCATION:
CHARGES:
BOND:
JUDGE:
REMARKS:

[Thumbprint Omitted In Printing]

BEST AVAILABLE COPY

Circuit Court, Fourth Judicial Circuit of Florida
State of Florida v. Terrance Jamar Graham

(Filed Dec. 13, 2004)

Docket #: 16-2003-CF-11912AXXXMA
DC#: J25706
Judge/Division: Day/C

STATE OF FLORIDA
DEPARTMENT OF CORRECTIONS

AFFIDAVIT
VIOLATION OF PROBATION

Before me this day personally appeared Celeste D. Donaldson who, being first duly sworn says that Terrance Jamar Graham, hereinafter referred to as the offender, was on the 18th day of December, A.D. 2003 placed on probation for the offense of Armed Burglary with Assault or Battery (Count 1) and Attempted Armed Robbery (Count 2) in the Circuit Court of Duval County, for a term of three (3) years in accordance with the provisions of Chapter 948, Florida Statutes.

Affiant states that the offender was instructed on the conditions of probation on June 29, 2004 by Officer Celeste D. Donaldson.

Affiant further states that the offender has not properly conducted himself, but has violated the conditions of his probation in a material respect by:

Violation of Condition (3) of the Order of Probation, by possessing, carrying, or owning any weapon or firearm and as grounds for belief that the offender

violated his probation. Officer Celeste D. Donaldson states that on 12/02/04, the offender did possess a firearm, as reported in the Arrest and Booking Report dated 12/02/04, as recorded by Arresting Officer B.E. Kee #5968 of the Jacksonville Sheriff's Office.

Violation of Condition (4) of the Order of Probation by failing to live and remain at liberty without violating any law by committing the offenses of Home Invasion Robbery, Fleeing/Attempting to Elude a Law Enforcement Officer; Aggravated (Chase), and Operating a Motor Vehicle While Driver's License is Suspended, Cancelled or Revoked on 12/2/04 in Duval County, FL and as grounds for belief that the offender violated his probation, Officer Celeste D. Donaldson states that the offender was arrested on 12/2/04 for said offenses by Officer B.E. Kee #5968 and S.D. Watzlawick #6798 of the Jacksonville Sheriff's Office.

Violation of Condition (5) of the Order of Probation, by associated with persons engaged in criminal activity, and as grounds for belief that the offender violated his probation, Officer Celeste D. Donaldson states tat [sic] on 12/2/04, the offender did associate with Kirkland Lawrence, age 20, and Meigo Bailey, age 20, who were engaged in criminal activity, as evidenced by their arrests with this offender on 12/2/04.

Violation of Condition (11) of the Order of Probation, by failing to make Court Cost payments to the probation officer as directed in accordance with the payment instruction of the Court, and as grounds for belief that the offender violated his probation, Officer

Celeste D. Donaldson states that the offender is $45.54 in arrears, as of 11/2/04.

[(Warrantless Arrest)] /s/ Celeste D. Donaldson
Celeste D. Donaldson
Officer

THIS AFFIDAVIT MUST BE NOTARIZED OR ATTESTED TO UNDER S. 117.10, FLA. STAT.

Sworn to and subscribed before me this 8th (day) of December (month), A.D. 2004 (year) by Celeste D. Donaldson, who is personally known to me or has produced identification _____.

Signature of
Attesting Officer
Under S. 117.10, F.S. _____
Title: Correctional Probation Senior Officer

OR [SEAL] **Carolyn Rivers Jackson**
Commission #DD273353
Expires: Dec 07, 2007
Bonded Thru
Atlantic Bonding Co., Inc.

Notary Public /s/ Carolyn Rivers Jackson
State of Florida at Large for Duval County

Approved by Supervisor: Date: 12/7/04
/s/ Deborah Harrison

(904) 695-4180/donaldson.celeste@mail.dc.state.fl.us
Officer Telephone/E-Mail Address

DC3-216 (Revised 10/04)

Circuit Court, Fourth Judicial Circuit of Florida
State of Florida v. Terrance Jamar Graham

(Filed Dec. 13, 2004)

STATE OF FLORIDA
DEPARTMENT OF CORRECTIONS
VIOLATION REPORT

Date: December 6, 2004

☒ REPORT CONTAINS CONFIDENTIAL INFORMATION

To:	Honorable Lance M. Day	From:	Celeste D. Donaldson
Name:	Terrence Jamar Graham	DC No:	J25706
Case No:	16-2003-CF-11912-AXXXMA	Circuit:	04-7 Jax West
		UC No.:	_____

TYPE OF REPORT

☐ Non-Compliance With Conditions ☒ Arrest/New Charge ☒ Warrantless Arrest

LOCATION

☒ In Custody
☐ On Bond
☐ ROR
☐ Absconder

Current Address Pretrial Detention Center
500 E. Forsyth St.
Jacksonville, FL 32202

(1) **HOW VIOLATION OCCURRED** ***(give detailed facts)*:**

Violation of Condition (3) of the Order of Probation, by possessing, carrying, or owning any weapon of firearm and as grounds for belief that the offender violated his probation. Officer Celeste D. Donaldson states that on 12/02/04, the offender did possess a firearm, as reported in the Arrest and Booking Report dated 12/02/04, as recorded by Arresting Officer B.E. Kee #5968 of the Jacksonville Sheriff's Office.

Violation of Condition (4) of the Order of Probation by failing to live and remain at liberty without violating any law by committing the offenses of Home Invasion Robbery, Fleeing/Attempting to Elude a Law Enforcement Officer; Aggravated (Chase), and Operating a Motor Vehicle While Driver's License is Suspended, Cancelled or Revoked on 12/2/04 in Duval County, FL and as grounds for belief that the offender violated his probation, Officer Celeste D. Donaldson states that the offender was arrested on 12/2/04 for said offenses by Officer B.E. Kee #5968 and S.D. Watzlawick #6798 of the Jacksonville Sheriff's Office.

Circumstances of the offender's arrests are as follows: Per Arresting Officer B.K. Kee #5968 of the Jacksonville Sheriff's Office, on 12/2/04 around 2037 hours (8:37 p.m.), the suspects knocked on the victim's apartment at [Home Address Omitted]. Once the victim opened the door, the suspects forced their way in and held up the two victims at gunpoint with handguns. Graham (this offender) directed the other

suspects to look for cash inside the apartment. The apartment was ransacked by the suspects. A gold chain and $57.00 cash was taken off of victim Balladares.

Following this home invasion, another was reported at 2050 hours (8:50 p.m.), [Home Address Omitted] where a shooting took place. After dropping off suspect Meigo Bailey at Memorial Hospital with co-defendant Kirkland Lawrence, this offender (Graham) fled in his vehicle and crashed it. Graham and Lawrence were apprehended and transported to the robbery office for an interview. The gold chain was recovered from Lawrence's right front pocket by Officer Edwards #6689. The $12.00 cash was recovered from Lawrence's [Illegible] left pocked [sic] as well. Terrence Graham was identified in a photo spread by both victims at the scene. These were shown separately by Detective Parrales, who also provided translations. Both victims separately identified Lawrence in a show up in the Homicide Interview room (via video monitor). Graham and Lawrence were transported to the Pretrial Detention Facility. Graham (this offender) was charged with Home Invasion Robbery and Bailey was absentee booked at Shands Hospital.

The offender further violated Condition (4) of the Order of Probation, in that: Per Arresting Officer S.D. Watzlawick #6798 of the Jacksonville Sheriff 's Office on 12/2/04 at 2104 (9:04 p.m.) an off-duty officer working at Memorial Hospital reported to dispatch that a subject just got dropped off at the emergency room with a gun shot wound. That off duty officer reported that

the vehicle the subject was dropped off in was a black vehicle that was just leaving the emergency room. Sgt. D.A. Janson #6393 located the suspect vehicle leaving the emergency room and initiated a traffic stop on the vehicle. The suspect's vehicle refused to stop after Sgt. Janson activated his blue lights and siren. A vehicle pursuit was initiated due to the suspect's vehicle failing to stop. The vehicle struck a concrete light pole at King Lane and Emerson Street. The driver exited the vehicle and fled on foot. R.J. Snow #7154 pursued the suspect on foot in the 3500 block of King Lane inside a fenced in area. Officer Watzlawick responded to the area of pursuit and located Officer Snow and the subject inside a fenced in area in the 3500 block of Ring Lane. The suspect was escorted out of the area to the patrol car. Officer Snow and Watzlawick searched the suspect. Snow located a cellular phone in the right front pocket of the suspect. A black stocking cap was also recovered from the suspect. He was transported to 501 E. Bay Street to be interviewed by Robbery (Division).

The suspect was charged with Fleeing/ Attempting to Elude a Law Enforcement Officer; Aggravated (Chase) and Knowingly Operating a Vehicle While Driver's License is Suspended, Cancelled or Revoked.

Violation of Condition (5) of the Order of Probation, by associated with persons engaged in criminal activity, and as grounds for belief that the offender violated his probation, Officer Celeste D. Donaldson states tat [sic] on 12/2/04, the offender did associate with Kirkland

Lawrence, age 20, and Meigo Bailey, age 20, who were engaged in criminal activity, as evidenced by their arrests with this offender on 12/2/04.

Violation of Condition (11) of the Order of Probation, by failing to make Court Cost payments to the probation officer as directed in accordance with the payment instruction of the Court, and as grounds for belief that the offender violated his probation, Officer Celeste D. Donaldson states that the offender is $45.54 in arrears, as of 11/2/04.

(2) **OFFENDER'S STATEMENT:**

☐ ADMITS ☐ ABSCONDED

☐ DENIES ☒ NOT AVAILABLE AT THIS TIME

(3) **HISTORY OF SUPERVISION:**

☒ ADJUDICATION WITHHELD ☐ ADJUDICATED

Original Sentence: Three (3) years probation 12/18/03.

Prior violation(s) of supervision for all periods of supervision and disposition(s) of violation(s) include the following:

None

Florida Crime Information Center (FCIC) and National Crime Information Center (NCIC) criminal history record attached. NOTE: FCIC/ NCIC criminal history record information is not public record, pursuant to Chapter 119, Florida Statutes.

RESIDENCE:

☒ STABLE ☐ UNSTABLE ☐ ABSCONDED

Resides with: Mother, Mary Graham, Father, Henry Jones, and siblings, ages 15, and [Illegible]. Offender was at home at appropriate times. He never missed a curfew check.

EMPLOYMENT:

☐ EMPLOYED ☐ RETIRED/DISABLED

☒ STUDENT ☐ UNEMPLOYED

Employer/school name and address: Wolfson High School, Powers Ave., Jacksonville, FL.

Full-time employment or school attendance: ☒
Part-time employment or school attendance: ☐

Monthly salary or other source of income: The offender was on a ten day suspension from school since 11/18/04 for fighting.

RESTITUTION:

☒ N/A ☐ PAID IN FULL

☐ COMPLYING ☐ DELINQUENT

COURT COSTS/FINES:

☐ N/A ☐ PAID IN FULL

☐ COMPLYING ☒ DELINQUENT

COST OF SUPERVISION:

☒ N/A	☐ PAID IN FULL
☐ COMPLYING	☐ DELINQUENT

PUBLIC SERVICE WORK:

☐ N/A	☐ COMPLETED
☒ COMPLYING	☐ DELINQUENT

TREATMENT STATUS:

☐ N/A	☒ COMPLETED
☒ COMPLYING	☐ NON-COMPLIANT

STATUS OF OTHER SPECIAL CONDITIONS:

Mentorship Program:	Complying
Continue School:	On Suspension
Case Management:	Complying
10:00 p.m. daily curfew:	Complying

(4) **RECOMMENDATION:**

Offenders placed on supervision by the court:

☒ Sentence the offender in accordance with the Florida Sentencing Guidelines or Florida Criminal Punishment Code. The scoresheet sentencing range provided by the State Attorney's Office is as required by Section 921.0024(3), Florida Statutes. Is not available.

If the sentencing range indicates a non-state prison sentence, or should the court elect to depart from the recommended Florida Sentencing Guidelines or Florida Criminal Punishment Code, the following alternative disposition is provided for the court's consideration: An extended sentence in Florida State Prisons is this officer's only recommendation.

The foregoing is true and correct to the best of my knowledge and belief.

/s/ Celeste D. Donaldson
Celeste D. Donaldson,
Officer

Approved:
/s/ Deborah Harrison
Deborah Harrison,
Supervisor

CDD/ah

RETURN

(For Interstate Compact Services Only)

Should return be attempted under Interstate Compact? _____ Will subject waive extradition? _____ Has Subject signed a Waiver? _____ Date and Place transfer officers should take custody _____ Name, address and phone number of person to be contacted upon arrival to pick up violator: _____

STATE OF FLORIDA

vs.

Terrance J. Graham

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.:
16 2003 CF ~~015979~~
11912 A XXX MA

DIVISION: CR-~~D~~ [C]

ADMISSION OF VIOLATION OF PROBATION/COMMUNITY CONTROL AND NEGOTIATED SENTENCE—FORM 8

(Filed Dec. 16, 2005)

1. I, Terrance Graham, Defendant herein, withdraw my previously entered Denial and enter an Admission of the Charge of Violation of Probation/ Community Control in the above-styled case.

2. I understand that if the Court accepts this plea, I give up my right to an evidentiary hearing, the right to require the State to prove the violation, the right to have the Judge decide whether I violated my probation/community control, the right to see and hear the witnesses against me and to have my lawyer question them, the right to subpoena and present witnesses or other evidence or any defenses I may have, and to testify or remain silent as I choose. I further understand that I give up my right to appeal the facts of the case. My lawyer has explained to me what an appeal is.

3. I understand that this Admission admits I violated my probation/community control, and further means there will be no evidentiary hearing and I will be sentenced based upon this plea.

4. I understand the charge which has been placed against me and to which I am pleading. My lawyer has explained maximum penalty to me, as well as the nature of the violation alleged and any defenses I may have. I am fully satisfied with my lawyer's advice and help.

5. No one has pressured me or forced me to enter this Admission. No one has promised me anything to get me to enter this Admission, but there has been an understanding that the disposition will be determined by the Court.

6. I agree to restitution in the amount of $ 0 .

7. I am entering this Admission because I believe it is in my best interest and it is what I wish to do of my own free will.

8. I agree that the Judge may find a factual basis for this Admission based upon the Affidavit filed by my Probation/Community Control Officer.

9. My education consists of 11th. I am not under the influence of any alcoholic beverage, drug or medicine at the time I sign this form. I am not suffering from any mental problem or condition which affects my understanding.

10. I have read every word in this written plea and have discussed it with my lawyer. I understand this form fully. The form was completely filled in when I signed it. There were no blanks.

SIGNED in Open Court at Jacksonville, Duval County, Florida, on December 16, 2005.

/s/ Terrance Graham
DEFENDANT

I hereby certify that, as counsel for the Defendant, I have discussed this case with my client and explained the rights, defenses and evidence relating it with him/her, I believe the Defendant understands this plea form, his/her rights, and the consequences of his/her plea, and that he/she is entering the plea freely, voluntarily, and knowingly.

/s/ Lance M. Day
CIRCUIT JUDGE

/s/ Rodney G. Gregory
COUNSEL FOR DEFENDANT

IN THE CIRCUIT COURT,
FOURTH JUDICIAL DISTRICT,
IN AND FOR DUVAL COUNTY,
FLORIDA

CASE NO.: 16 2003 CF 011912 AXXX MA

DIVISION: CR-C

STATE OF FLORIDA

-VS-

TERRANCE JAMAR GRAHAM,

Defendant.

(Filed Dec. 27, 2005)

TESTIMONY AND PROCEEDINGS taken on **Friday, December 16, 2005,** before **The Honorable Lance M. Day,** Judge of the Circuit Court, Division CR-C, in the Duval County Courthouse, Jacksonville, Florida, and as reported by Jayne Foreman, Court Reporter and Notary Public in and for the State of Florida at Large.

– – –

OFFICIAL REPORTERS, INC.
201 E. Adams Street
Jacksonville, FL 32202
(904) 358-2090

[2] APPEARANCES:

DARIN GARDNER, Esquire,

and **OCTAVIUS HOLLIDAY, Esquire**

Appearing on behalf of the State.

RODNEY GREGORY, Esquire,

Appearing on behalf of the Defendant.

[3] INDEX

STATE'S WITNESSES PAGE

CELESTE DONALDSON

Direct Examination by Mr. Gardner.....31

CARLOS RODRIGUEZ LOPEZ

Direct Examination by Mr. Gardner.....49

Cross-Examination by Mr. Gregory.....62

Redirect Examination by Mr. Gardner.....75

Recross Examination by Mr. Gregory.....75

CESAR PARRALES

Direct Examination by Mr. Gardner.....81

Cross-Examination by Mr. Gregory.....89

BRIAN KEE

Direct Examination by Mr. Gardner.....93

Cross-Examination by Mr. Gregory.....97

SHAUN KOBYLARZ

Direct Examination by Mr. Gardner.....100
Voir Dire Examination by Mr. Gregory 103
Direct Examination Cont. by Mr. Gardner.....107
Voir Dire Examination by Mr. Gregory 108

MATTHEW EDWARDS

Direct Examination by Mr. Holliday 112
Cross-Examination by Mr. Gregory 116

– – –

[4] EXHIBITS

State's in Evidence

No. 1 43
No. 2 57
No. 3 59
No. 4 62
No 5 103
No. 6 107
No. 7 107
No. 8 110
No. 9 110
No. 10 110

[5] PROCEEDINGS

December 16, 2005 3:35 p.m.

THE COURT: Let's go ahead take up the last case. I believe it is Graham. That is the case set for VOP.

MR. GARDNER: Yes, Your Honor.

(The defendant is present.)

THE COURT: Show Mr. Graham is before the Court here for a VOP hearing, I'm showing on my calendar, or a possible disposition.

MR. GREGORY: Yes, sir.

(Mr. Gregory confers with the defendant.)

THE COURT: I just asked him, Do you still want a VOP hearing or a violation of probation hearing? Do you want to mention anything at this time since your mother is here? He said, I want a hearing.

Is that correct, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Then the Court has the allegations that are provided in the affidavit for the violation of probation.

Is the state ready to proceed?

MR. GARDNER: Yes, sir, Your Honor. We're going to proceed today on the condition [6] —the

violations in condition three and condition four, the new law violations of the home-invasion robbery and the fleeing charge and then the violations alleged in condition five. And we're going to forego the driving charge and the monetary charges which I believe is condition 11.

THE COURT: You are going to forego the what?

MR. GARDNER: The court costs in condition 11.

THE COURT: So you're abandoning condition 11?

MR. GARDNER: Yes, sir, and the driving charge in condition four.

THE COURT: What do you mean the driving charge?

MR. GARDNER: The DWLS. He was arrested for that also.

THE COURT: All right.

MR. GREGORY: Your Honor, can I have just a moment, please, sir?

THE COURT: Sure.

(Mr. Gregory confers with the defendant.)

THE COURT: Madam clerk, check and see [7] what counts he is placed on probation for.

THE CLERK: Counts 1 and 2, Your Honor.

THE COURT: And what are the guidelines on counts 1 and 2?

MR. GARDNER: Judge, I left his—

THE COURT: I'm showing 66.75 months—

MR. GARDNER: That's correct.

THE COURT: —to life.

MR. GARDNER: It was 66 before, and I think just the violation bumped it up six points. That sounds correct, yes, sir. I apologize. I left the VOP file upstairs.

THE COURT: All right.

MR. GREGORY: Okay.

THE COURT: Ready to go?

MR. GREGORY: Yes, sir.

THE COURT: Again, the guidelines are 66.75 months to life. And the state is ready to proceed?

MR. GARDNER: Yes, sir, Your Honor.

MR. GREGORY: Your Honor, can we approach side bar just a second as a matter of protocol?

THE COURT: All right.

(Side bar, Court and counsel.)

[8] MR. GREGORY: Your Honor, for the Court's indulgence and perhaps sometimes things come to a client . . . . . better when it comes from a higher authority, meaning the bench. If the Court could speak only as to admission—what admission to any allegation would do to the violation of probation status. Then I'll briefly talk to him and see what he wants me to do.

THE COURT: The substance of violation, which a violation of the criminal code would be, for example, if the state proves that there is a violation due to a home-invasion robbery or a fleeing or attempting to elude or an aggravated chase, all of which are felonies, then the exposure is 66.75 months to life.

MR. GREGORY: Regardless.

THE COURT: In other words if they prove the home-invasion robbery but can't prove the fleeing, then the exposure is still 66.75 months to life. If they prove the fleeing but can't prove the home-invasion robbery, the exposure is still 66.75 months to life. It is a violation of probation.

[9] MR. GREGORY: And if he admitted to one and not the other, it is still the same exposure.

THE COURT: Still 66.75 months to life.

MR. GREGORY: Do you understand that?

THE DEFENDANT: (Nods head affirmatively.)

(Mr. Gregory confers with the defendant.)

MR. GREGORY: Your Honor, he has advised me—I asked him, Do you understand all of that? He said, Yes. I said, what do you want to do? He said, Admit to the allegation about fleeing and eluding.

THE COURT: But you understand that your guidelines will still be 66.75 months to life; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And you understand at the sentencing hearing that doesn't preclude the state from bringing in other information before the Court? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: In other words, the Court doesn't sentence you in a vacuum. Do you [10] understand that?

THE DEFENDANT: Say that one more time now.

THE COURT: In other words I'm not going to be just limited to just one little area. The Court looks at your entire record, and I'll look at all of the facts and circumstances surrounding this case. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. If that is what you want to do, go over the plea form with your attorney and then bring it back before the Court.

MR. GREGORY: We have done that before, Your Honor, when we were stopped the last time. I can go over it again for the record. But he's actually reviewed it. We have gone through the whole discussion. I'll get another one if it's not in the clerk's file.

MR. GARDNER: Can I ask a question, Your Honor?

THE COURT: Sure.

MR. GARDNER: If he admits to the fleeing, so that won't prohibit us from [11] arguing the fact that we believe he committed the robbery in aggravation as well as a variety of other robberies?

THE COURT: Correct.

MR. GARDNER: Okay.

MR. GREGORY: Your Honor, he has asked me, Won't they consider what he has done in mitigation? I said, Yes, the Court will consider anything that he presents in mitigation or that the state would present in aggravation.

This is the same form that—at this point I'm going to speak louder.

Is this the same form we went over before (addressing the defendant)?

THE COURT: I understand all of that. What is the real issue here? It sounds like the issue is not the fleeing.

MR. GREGORY: No, sir.

THE COURT: So what is the issue?

MR. GREGORY: I think it's a bit of confusion on his part. I've discussed it with him on several occasions. His concern is he did not want to admit to the robbery. He did not want to enter an admission to the [12] violation of probation and have you take it as admission by him of the robbery, and I've told him repeatedly if he admits to what he knows he did and what he wants to admit to, then the Court is not saying—or there is no admission by him to anything other than that.

If the state presents something beyond that, the Court would consider it. If I present something below that or in mitigation, the Court will consider, the Court will impose his sentence based on that.

But he is not admitting to the substantive charge of home-invasion robbery, which means at some point he is ready to go to a jury trial if that is not dropped.

THE COURT: But you understand that just so we are clear about this, if he admits to the fleeing, the state still has the prerogative of going forward on the other allegations. Do you understand that?

MR. GREGORY: Yes, sir. And if they do, then—

THE COURT: In other words, the fleeing just would not be part of the—you would not have to prove that up. But the state can [13] still go forward on the other allegations. We are not done for today.

In other words, if the state wants me to be able to consider the robberies, then they'll go forward on the robberies because the Court can consider that.

MR. GREGORY: My understanding of where we are now—correct me if I am wrong—is that if he admits to the allegations, since admission is admission and he facing the same range, whatever else the state wants to present at the sentencing hearing they would present at the sentencing hearing because the Court would find a violation, pass it for sentencing, and then whatever the state wanted to present at sentencing, which is where they would bring up the home invasion stuff and I would bring up mitigation, it would be considered at that point? But effectively it would stop the hearing today because admission is admission and all you need to do is find admission and violation. Once you found it, there is no need to go forward with the hearing.

THE COURT: If he is agreeable with doing [14] it that way, I have no problems with doing it that way. If the state is agreeable with doing it that way, that is fine too.

But the bottom line is if he admits to a fleeing, he has proven up a substantive—he has admitted to a substantive violation of his probation—

MR. GREGORY: Yes, sir.

THE COURT: —and has exposed himself to 66.75 months all the way out to life.

MR. GREGORY: Yes, sir.

You understand that?

THE DEFENDANT: Yes. Also . . .

THE COURT: If there is a valid legal reason for the Court to go below the guidelines—in other words, I make that decision whether or not there is a valid legal reason to go below the guidelines.

Your attorney will present several things in hopes that the Court will make that decision and reach that conclusion, but there is no guarantee that I will reach that conclusion. In other words, he can present several things and I can say I understand all of that, but I don't find that that's a valid [15] legal reason to go below the guidelines given the nature of the case.

THE DEFENDANT: Yes, sir.

THE COURT: And your exposure then is still 66.75 months to life.

THE DEFENDANT: Yes, sir.

THE COURT: And that is a heavy exposure so you had better understand and know what you are doing.

THE DEFENDANT: Yes, sir.

THE COURT: So if you want a few moments with your attorney and go ahead and sit down with your attorney, go over it with him.

(Mr. Gregory confers with the defendant.)

THE COURT: What I am trying to make sure that you understand, sir, is that the state intends to still present evidence that you also committed the crimes of—

MR. GARDNER: Home-invasion robbery.

THE COURT: —home-invasion robbery and that they want the Court to consider that.

In other words, they don't want me to just have the fleeing and attempting to elude and not consider anything else. That is what they want me to consider as well as part of [16] your sentencing.

THE DEFENDANT: Yes, sir.

THE COURT: That is the decision that needs to be made. In other words, they can still go forward and if you admit to just this crime, that doesn't prevent them from going forward to the violation hearing so that they can prove up the rest of it for the Court's consideration.

If they can't, then the Court would make a finding that they didn't, and I would still consider just the fleeing. But if they can, then I consider the home-invasion robbery and the fleeing.

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Unless you all agree further that the Court could consider it as part of the sentencing package, then we would still have to have the hearing either way.

THE DEFENDANT: Okay.

THE COURT: In other words, I can't just consider evidence just to consider evidence that is not part of either his prior record or [17] some, at that point, unproved crime. I can't consider unproved crimes. So if it is not admitted to, the state has the option of going forward.

So go ahead and talk to your client and decide what you want to do, and then let's get this thing going.

(Mr. Gregory confers with the defendant.)

MR. GREGORY: Your Honor, he has advised me that he wants to admit to the violation of probation allegation as to the fleeing. He is going to maintain the denial as to the other allegations.

THE COURT: All right. Then go ahead and raise your right hand to be sworn.

THE CLERK: Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth so help you God?

THE DEFENDANT: I do.

THE CLERK: Thank you.

THE COURT: All right. Mr. Graham, your attorney on your behalf has entered an admission in Case No. 16-2003-11912. Has that admission been entered with your knowledge and [18] consent?

THE DEFENDANT: Yes, sir.

THE COURT: Are you entering that admission because you did in fact violate your probation as to condition four, felony fleeing and attempting to elude an officer?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you understand that by entering that admission that the underlying charges that you were placed on probation for were both for attempted unarmed robbery—excuse me, attempted robbery with a firearm? Those are both first-degree felonies punishable up to life and that your guidelines are 66.75 months to life. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that by entering this admission that you are giving up certain constitutional rights, specifically the right to have a hearing before the Court on this matter as to that charge; do you understand that—

THE DEFENDANT: Yes, sir.

THE COURT: —allegation?

[19] THE DEFENDANT: Yes, sir.

THE COURT: That you are giving up the right to require the state to prove the charges against you as to that allegation. You are giving up the right to assistance of counsel, the right to compel the attendance of witnesses on your behalf, the right to confront and cross-examine the witnesses against you, and the right not to be compelled to incriminate yourself. Do you understand that by entering this admission that you give up all of those constitutional rights and there will not be a hearing as to this matter; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, in your case the state and your attorney have not negotiated the sentence. You have pled straight up to the Court. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: That means as to this allegation that we will pass the case for sentencing at a future date. I'll listen to both sides. After hearing

from both sides, then the Court would determine what your [20] proper sentence is. But unless there is a valid legal reason to go below the guidelines, then the starting point of your sentence would be 66.75 months to life. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And how was this structured originally? Did these sentences run concurrently originally? They must have.

MR. GARDNER: I believe so, Your Honor.

THE CLERK: Yes, Your Honor.

THE COURT: So that would be a concurrent sentence above 66.75 months to life. And unless there is a valid legal reason to go below the guidelines, that's the starting point. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And as I mentioned to you earlier, I'm the one who will make the decision as to whether or not there is a valid legal reason to go below the guidelines. Your attorney will certainly present evidence to try and convince me of a legal reason to go below the guidelines, but I'll make the ultimate decision as to that. Do you [21] understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right, sir. And you understand that I'm not bound by the recommendations of either side?

THE DEFENDANT: Yes, sir.

THE COURT: Has anybody threatened, forced, or intimidated you to get you to enter this plea?

THE DEFENDANT: No, sir.

THE COURT: Has anybody, including your lawyer, promised you that you would receive any particular sentence?

THE DEFENDANT: No, sir.

THE COURT: Because you understand if anybody is telling you go ahead and do this, I know this Judge and he will sentence you to X, that would be incorrect because at this point I don't know what your sentence is going to be other than what I have just gone over with you. Do your understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And that is that your range is 66.75 months to life. Do you understand that?

[22] THE DEFENDANT: Yes, sir.

THE COURT: Has anyone promised you any hope of reward or better treatment or anything else in order to get you to enter this plea?

THE DEFENDANT: No, sir.

THE COURT: I'm showing you a plea form entitled Admission of Violation of Probation/ Community Control Negotiated Sentence Form 8. Did you go over this plea form extensively with your attorney prior to entering your plea today?

THE DEFENDANT: Yes, sir.

THE COURT: Did your lawyer answer all of your questions to your complete understanding regarding your case and any possible defenses to the charges that you might have?

THE DEFENDANT: Yes, sir.

THE COURT: Excuse me?

THE DEFENDANT: Yes, sir.

THE COURT: Are you satisfied with your attorney's representation of you in this case?

THE DEFENDANT: Yes, sir.

THE COURT: Keep your voice up for me.

THE DEFENDANT: Yes, sir.

THE COURT: On the front of the plea form [23] on the line marked Defendant is that your signature?

THE DEFENDANT: Yes, sir.

THE COURT: And did you sign your name on the plea form as your acknowledgment that you

understand all of the matters as set forth on the plea form?

THE DEFENDANT: Yes, sir.

THE COURT: As you are standing here today, are you currently or have you been in the last 24 hours under the influence of any alcohol, drug, medication, substance, or condition which might interfere with your understanding or appreciation of this plea and the consequences of it?

THE DEFENDANT: No, sir.

THE COURT: Do you have any physical or mental defects which might prevent you from understanding what is taking place at this time?

THE DEFENDANT: No, sir.

THE COURT: And, counsel, are you aware of any mental health issues regarding your client?

MR. GREGORY: No, sir.

[24] THE COURT: Do you understand that by entering this plea that you give up your right to appeal all matters relating to the judgment in this case including the issues of guilt or innocence or any pretrial motions that may have been filed on your behalf?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand the amount of prison time that you will actually serve on

any particular sentence imposed by this Court is up to the Department of Corrections and if your attorney or anyone else has told you how much time that they think you are going to serve on any type of sentence that might be imposed by this Court, that is just an estimate on their part and it is not binding on the Department of Corrections? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And if the time that you are required to serve turns out to be different from any estimate, you would not be allowed to use that as a basis to withdraw your plea. Do you understand that?

THE DEFENDANT: Yes, sir.

[25] THE COURT: Do you understand if you are not a United States citizen, your plea may subject you to deportation from the United States? Are you in fact a U.S. citizen?

THE DEFENDANT: Yes, sir.

THE COURT: How far in school did you go?

THE DEFENDANT: Eleventh.

THE COURT: Can you read and write the English language?

THE DEFENDANT: Yes, sir.

THE COURT: Is there anything on the plea form that you didn't understand or comprehend?

THE DEFENDANT: No, sir.

THE COURT: Have you had sufficient time to consider the charges against you?

THE DEFENDANT: Yes, sir.

THE COURT: Have you enough time to consider any possible defenses to those charges and go over that with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: Have you had enough time to consider the advice of your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: Have you had enough time to consider the waiver of your constitutional [26] rights by entering this plea?

THE DEFENDANT: Yes, sir.

THE COURT: And have you had sufficient time to reflect upon the consequences of entering this plea?

THE DEFENDANT: Yes, sir.

THE COURT: Do you still wish to admit that you violated your probation as to the allegation that you committed the felony of felony fleeing and attempting to elude a police officer, aggravated chase?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Let me have a factual basis as to that charge.

MR. GARDNER: Your Honor, if this case had proceeded to a hearing, the State of Florida would be prepared to prove by a greater weight of the evidence that the defendant Terrance Graham violated condition four of his probation by committing the third-degree felony offense of felony fleeing or attempting to elude a law enforcement officer.

The state would have been prepared to show that on December 2nd, 2004, this [27] defendant dropped off two codefendants, Kirkland Lawrence, Meigo Bailey at Memorial Hospital. Afterwards he left the hospital, was ordered to stop, and he continued to flee. Sergeant Jansen with the Jacksonville Sheriff's Office fell in behind him, activated his lights and sirens, and this defendant continued to flee. He reached speeds of approximately 90 miles an hour while fleeing from the police and finally lost control of the vehicle and was apprehended after a short foot chase.

And this occurred in Duval County, Florida.

THE COURT: For the purposes of the plea does the defense have any legal objections to the factual basis outlined by the state?

MR. GREGORY: No, Your Honor. we will stipulate to a factual basis as it relates to the fleeing without getting into the other allegations, the other references before the fleeing and eluding.

THE COURT: Then the court finds that there is a factual basis and further finds the

defendant has freely and voluntarily entered [28] his admission with a full understanding of the nature of the charge, the consequences of the plea, and the minimum and maximum possible sentence herein. I therefore accept the defendant's plea and his admission that he violated his probation at this time as to that allegation contained within the affidavit for violation of probation.

And with that does the state still intend to go forward on the other allegations within the affidavit?

MR. GARDNER: Yes, sir, Your Honor.

THE COURT: All right. Then Mr. Graham, go ahead and have a seat.

MR. GREGORY: But the state is not going forward with the license allegation, the driving while license suspended or revoked allegation?

THE COURT: Right. They indicated that earlier.

MR. GREGORY: Yes, sir.

THE COURT: All right. If the state would call their first witness.

MR. GARDNER: And just before we begin, I filed a notice of intent to seek judicial [29] notice, discretionary judicial notice of the official court file for Mr. Graham, the order of probation, the affidavit of violation of probation, and the arrest warrant contained therein pursuant to Sections 90.202(6) and 90.203 of the Florida Evidence Code.

I provided notice to Mr. Gregory by fax on December 12th.

THE COURT: And what says the defense?

MR. GREGORY: I don't think judicial notice is required for you to look at the court file, which is the file of the case.

THE COURT: But do you have any objections to the Court looking at the court file?

MR. GREGORY: No, sir. The court file in this case, no, sir.

THE COURT: Well, we will show that the notice of intent to seek judicial notice has been filed, and you are saying that you have no problems with the Court taking judicial notice of the order of probation, the affidavit of violation of probation, and the arrest warrant for violation of probation?

MR. GREGORY: That's correct, sir.

[30] THE COURT: Then the Court will take judicial notice of those items.

MR. GARDNER: May I call my first witness, Your Honor?

THE COURT: Yes.

MR. GARDNER: The state would call Celeste Donaldson from the Department of Corrections.

THE COURT: Ms. Donaldson, if you will come down to the witness stand to be sworn in, please. Come on down here. It will be a lot easier for you.

As best you can if you will raise your right hand to be sworn. Do you swear or affirm that the testimony you are about to give in this cause will be the truth, the whole truth, and nothing but the truth so help God?

THE WITNESS: I do.

THE COURT: All right. If you will have a seat and we'll adjust that mic for you.

Proceed, Counsel.

CELESTE DONALDSON,

having been produced and first duly sworn as a witness on behalf of the state, testified as follows:

[31] DIRECT EXAMINATION

BY MR. GARDNER:

Q Can you tell us your name, please.

A Celeste Donaldson.

Q Ms. Donaldson, where are you employed?

A Department of Corrections.

Q And what is your current position with the Department of Corrections?

A Correction and probation senior officer.

Q And how long have you been so employed?

A Approximately 31 years.

Q As part of your employment do you supervise people placed on probation?

A Yes, I do.

Q Did you have an opportunity to supervise a person by the name of Terrance Graham, the defendant in this case?

A Yes.

Q Do you see him here in the courtroom today?

A Yes, I do.

Q Would you please point to where he is seated and identify an article of clothing he has on.

A He is sitting next to Attorney Gregory with the green shirt on.

MR. GARDNER: Your Honor, let the record [32] reflect the witness has identified the defendant.

THE COURT: The record will so reflect.

Q Ms. Donaldson, as an officer, the DOC officer for the defendant do you maintain the care, custody, and control of the DOC file that is created for Mr. Graham?

A Yes, I do.

Q Do you recall when you established a file for Mr. Graham?

A On or about December 20th, 2003.

Q Are the notations, records, and documents in your file filled out or completed at the time or shortly after the information is obtained?

A Yes.

Q And what case number, court case number is that in reference to?

A 16 2003 CF 11912 AXXX MA.

Q Does your file indicate when exactly the defendant was placed on probation?

A Yes, it does.

Q And when was that?

A December 18th, 2003.

Q Do you know what the charges were for?

A Yes, I do.

Q And what were those?

[33] A Armed robbery with assault or battery, count one, and attempted armed robbery, count two.

Q Are you sure about the count one? It should be armed burglary. Does that sound right?

A That is what the probation order says.

Q Okay. When did you actually begin supervising—

THE COURT: It should be what?

MR. GARDNER: It should be—the first one should be armed burglary and then attempted armed robbery. Correct, count one.

THE WITNESS: Armed burglary with assault or battery?

MR. GARDNER: Correct. Yes, ma'am.

Sorry about that.

BY MR. GARDNER:

Q When did you actually begin supervising the defendant?

THE COURT: Well, I was going by what—you said counts one and two. When I did the plea colloquy with Mr. Graham, I said armed robbery with—attempted armed robbery with a firearm. That is what it says here on the calendar.

MR. GARDNER: Correct. That's count two.

[34] THE COURT: Well, it says one and two.

MR. GARDNER: Count one should be armed burglary with assault or battery.

THE COURT: We really need to get this calendar straightened out if that is correct.

MR. GARDNER: I think you were aware that that is what the charge is. I think that is what is alleged in the affidavit as well, Your Honor. I apologize for not catching that.

THE COURT: Well, it says attempted with a firearm, counts one and two on the calendar. That is what I read off of. That is what I always read off of.

THE CLERK: You were reading the second case, Your Honor. Go to page six.

THE COURT: I stand corrected. I was reading the wrong one.

And the guidelines are still the same?

MR. GARDNER: Yes, sir, Your Honor. That is what they were calculated based on the armed burglary with the assault or battery and attempted armed robbery.

THE COURT: And they are both still first-degree felonies punishable up to life.

Do you understand that, Mr. Graham?

[35] MR. GARDNER: Actually, the armed burglary is the life felony. The attempted armed robbery is a second-degree felony as charged in the information.

MR. GREGORY: And it is armed with a weapon as a pipe, not a firearm.

THE COURT: Then I'm going to allow him to withdraw his plea. We are going to just have a regular VOP hearing.

But you need to tell me when I'm doing these. I'm not saying this just to say it to the walls. When you hear me say what the guidelines are, if that's—if I ask you what the guidelines are, I need to know what they are. If you hear me say a count and if it's incorrect, you need to say something.

MR. GARDNER: Yes, sir.

THE COURT: All right.

MR. GARDNER: Yes, sir.

THE COURT: I'm exposing him up to life on a second-degree felony.

MR. GARDNER: Yes, sir. I understand that. I apologize for not catching that.

THE COURT: Let's take a five-minute recess.

[36] (Discussion off record and recess.)

(The defendant is present.)

THE COURT: Show we are back on the record. The defendant is present with his attorney as is the state.

Let's go through this one last time. On the VOP—

Madam Clerk, if you would confirm this with your file as well. What was the defendant convicted of, please?

THE CLERK: He was convicted of armed burglary with assault or battery, count one; and count two, attempted armed robbery.

THE COURT: And let me ask the state then, as to count one, what level offense is that?

MR. GARDNER: It's a first-degree felony punishable up to life, Your Honor.

THE COURT: And the attempted armed robbery with a weapon?

MR. GARDNER: That's a second-degree felony, Your Honor. It would be a first if it was armed robbery with a weapon. Because of the attempt, it drops it down to a second.

THE COURT: So the guidelines that you [37] gave the Court earlier, 66.75 months to life, actually apply to count one?

MR. GARDNER: That is both together, Your Honor.

THE COURT: Well, obviously you can't give him life as to count two, so the life—

MR. GARDNER: Exposure, yes, sir.

THE COURT: —goes to count one?

MR. GARDNER: Yes.

THE COURT: So his exposure as to count two is 66.75 months to 15 years. Does the state concur?

MR. GARDNER: Yes, sir.

THE COURT: Does the defense concur?

MR. GREGORY: Yes, sir.

THE COURT: All right. Then let's go back.

Mr. Graham, come on back up for a second. On your admission the Court was reading the second charge, the current charges against you, attempted armed robbery with a firearm. Do you understand that the admission that you are entering on was actually for burglary with assault? According to the calendar—let me see the information so I can read it off of [38] that. Armed burglary with assault or battery, that is actually the first punishable by life, and the guidelines as to that case, as to that charge, is 66.75 months to life.

The second count that you are entering your admission on in terms of sentencing exposure is count two, attempted robbery with a weapon. That was a second-degree felony, and your exposure on that one is 66.75 months to 15 years. So I was incorrect when stating life. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And what I want to make sure is do you want to still maintain your admission

that you violated your probation or do you want to reinstate your denial?

THE DEFENDANT: No, sir.

THE COURT: So you want to maintain your admission that you violated your probation as to the felony fleeing; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: So you understand, so I stand corrected then is that just on that, you understand as to count one, just on that admission as to count one, your exposure is [39] 66.75 months to life. And then as to the count two that you were placed on probation for, your exposure is 66.75 months to 15 years. Do you understand that?

THE DEFENDANT: So that would be I get sentenced twice on that charge?

THE COURT: Well, you get sentenced twice, but it is running concurrent. But your maximum exposure—I was incorrect. I thought your maximum exposure was life on both counts. Your maximum exposure on count two that you were placed on probation was actually for 15 years as opposed to life. That is where I was incorrect. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And do you still want to maintain the admission that you violated your probation as to the felony fleeing?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And you understand again that we would have a sentencing hearing on that. But the state has decided to go forward to try and prove up the other allegations in the affidavit for [40] violation. So the court could consider that if you are in fact found in violation of those conditions as well. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Because the state wants the Court to consider that as part of the sentencing package. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And so you still want to go forward with the violation hearing as to those allegations; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: But you want to maintain your admission as to the felony fleeing, which would be a violation of condition four; is that correct?

THE DEFENDANT: Yes, sir.

MR. GREGORY: For part of condition four, yes, sir.

THE COURT: Part of condition four, exactly, for the felony fleeing as alleged.

MR. GREGORY: Yes, sir.

THE COURT: You still want to maintain that admission?

THE DEFENDANT: Yes, sir.

[41] THE COURT: Then the Court will allow the admission to stay in effect.

Go ahead and have a seat.

MR. GREGORY: For the record, Your Honor, may the record reflect that I did not speak with—my client did not speak with me during your inquiry of him now or before.

THE COURT: Well, you could have talked to him.

MR. GREGORY: No. I'm just saying I've had occasions where a defendant may say I was talking to him and he didn't hear what the Court was saying. I just want the record to reflect—

THE COURT: . . . during this dialogue.

MR. GREGORY: Yes, sir, during the dialogue.

THE COURT: But you certainly had the opportunity to discuss this during this recess.

MR. GREGORY: Of course, and I did do that. I am just saying that during the dialogue I did not interfere with his ability to hear the Court and talk to the Court directly.

[42] THE COURT: You heard everything that was between you and I?

THE DEFENDANT: Yes, sir.

MR. GREGORY: Thank you, sir.

THE COURT: Do you have any questions about any of this?

THE DEFENDANT: No, sir.

MR. GREGORY: Thank you, sir.

THE COURT: All right. Now that we are all on the same page, proceed, Counsel.

BY MR. GARDNER:

Q Ms. Donaldson, when did you first actually meet the defendant after you began supervising him, like physical contact with him or personal contact?

A June 21st, 2004.

Q Did you have a time to actually sit down with him and instruct him on those conditions of probation?

A I did.

Q Do you know when that was?

A June 29th, 2004.

Q And where did that occur?

A In my office.

Q And what exactly did you instruct him from?

A The certified conditions of supervision from the Court.

[43] MR. GARDNER: Your Honor, may I approach the witness?

THE COURT: Yes.

Q I'm going to show you what has been marked for identification for this hearing as State's Exhibit A. Take a moment to look at that. Do you recognize that?

A Yes, I do.

Q What do you recognize that to be?

A It is a copy of the certified order of conditions of probation.

Q The same ones that you instructed Mr. Graham from?

A Yes.

Q Does it appear to be altered or modified in any way?

A Not at all.

MR. GARDNER: Your Honor, at this time the state would move what has been previously marked as State's A in as State's 1.

THE COURT: Any objections?

MR. GREGORY: No, sir.

THE COURT: Without objection State's A for identification as alpha will become State's 1.

(State's Exhibit No. 1 was received in [44] evidence.)

BY MR. GARDNER:

Q I'm sorry, Ms. Donaldson, did you say where that occurred at?

A At my office.

Q And can you tell the court how you instructed him on the conditions of probation.

A The conditions of probation are read to each offender. And once they have been read, we go over them and we ask questions. We ask the defendants if they have any questions with reference to what the Court has ordered. And once they acknowledge that they understand the conditions of supervision, at that point I give them the order and have them to sign it.

Q And did you go over each one of the conditions of probation with this defendant?

A I did.

Q Did he appear to understand the conditions?

A He did.

Q Did you notate in your file that he had any questions at all?

A There was no notation of any questions.

Q And what did you have the defendant do after you instructed him on the conditions of his probation?

A He signed the certified order from my file, [45] and he also received a copy of a certified order for himself.

Q Can you just briefly tell us what condition three is.

A In effect it says that the individual will not possess, carry, or own any firearm—

Q And what about—

A —without authorization.

Q I'm sorry I cut you off. What about condition four?

A Condition four states that they will live without liberty without violating any law.

Q And what about condition five?

A Condition five states you will not associate with any person engaged in any criminal activity.

Q Now, Ms. Donaldson, did you receive some information that this defendant allegedly violated conditions three, four, and five of his probation?

A I did.

Q And what were the allegations of how, just briefly, of how he violated those conditions?

A He violated condition one according to the affidavit that was submitted by being in possession of a weapon according to the offense report submitted by Jacksonville Sheriff's Office for an arrest that [46] happened on December 2nd, 2004.

Q And which condition was that a violation of?

A Condition three.

Q And what about condition four?

A Condition four is alleged that he failed to live and remain at liberty without violating any law as evidenced by his arrest by the Jacksonville Sheriff's Office on December 2nd, 2004.

Q What offenses other than the fleeing charge?

A Home-invasion robbery, aggravated chase, operating a motor vehicle while driver's license is suspended, cancelled, or revoked.

Q And what about condition five, what were the allegations of how he violated condition five?

A By associating with persons engaged in criminal activity in that there were two other individuals arrested at the same time as the defendant.

Q Do you know what their names were?

A Kirkland Lawrence, and I believe it is pronounced Meigo Bailey.

Q Would you spell that.

A M-e-i-g-o.

Q After you received the allegations that the defendant had violated these particular conditions of his probation, what action did you take?

[47] A An affidavit for violation of probation, a warrant, and a violation of probation report was submitted to the Court.

MR. GARDNER: I don't have any other questions, Your Honor.

THE COURT: Any cross-examination?

MR. GREGORY: No, sir.

THE COURT: Ms. Donaldson, thank you very much.

THE WITNESS: You are welcome, Judge.

THE COURT: Good to see you again.

THE WITNESS: Good to see you too.

(Witness excused.)

THE COURT: All right. Call your next witness.

MR. GARDNER: Your Honor, at this time the state calls Carlos Rodriguez.

THE COURT: Carlos Rodriguez, please.

MR. GARDNER: And, Judge, there actually should be an interpreter out in the hallway as well.

THE COURT: Mr. Rodriguez, if you will come down to this area here, please.

Let me ask the interpreter to step before the clerk so the clerk can swear you in.

[48] Madam Clerk, if you will swear in the interpreter.

THE CLERK: Do you solemnly swear to interpret Spanish to English and English to Spanish so help you God?

THE INTERPRETER: I do.

THE CLERK: Thank you.

THE COURT: And if you would please give your full name for the record.

THE INTERPRETER: My name is Sergio Larosa.

THE COURT: And you are a certified interpreter; is that correct?

THE INTERPRETER: Yes, I am, Your Honor.

THE COURT: And you are on the court administrator's list; is that correct?

THE INTERPRETER: That's correct.

THE COURT: If you will step over to the witness, please.

THE INTERPRETER: Thank you.

THE COURT: And if you will Interpret for me. Ask the defendant to raise his right hand and place his left hand on the Bible.

Do you swear or affirm the testimony you are about to give in this cause will be the [49] truth, the whole truth, and nothing but the truth so help you God?

THE WITNESS: Yes, I do.

THE COURT: All right, Is the cell phone off?

THE WITNESS: No.

THE COURT: Turn it off, please.

THE INTERPRETER: It's off already, Your Honor.

THE COURT: All right. If you would go ahead and have a seat, please.

Proceed, Counsel.

CARLOS RODRIGUEZ LOPEZ,

having been produced and first duly sworn as a witness on behalf of the state, testified as follows:

DIRECT EXAMINATION

BY MR. GARDNER:

Q Can you tell us your name, please.

A Carlos Rodriguez Lopez.

Q Mr. Rodriguez, how old are you?

A Twenty-nine years old.

Q How long have you lived in Jacksonville?

A A year and two months.

Q How long have you been in the United States?

A A year and two months.

[50] Q Are you employed at this time?

A Yes.

Q Mr. Rodriguez, back on Thursday, December 2nd, 2004, where were you living?

A I live in [Home Address Omitted].

Q And who were you living with at that time?

A With my wife and my stepson.

Q And was the apartment in his name?

A Yes.

THE COURT: If you would ask the questions as if you're talking to the defendant, and he will interpret it for you.

BY MR. GARDNER:

Q Mr. Rodriguez, on that day did you go to work?

A Yes. I was working.

Q What time did you get home that evening?

A Between 4:00 and 5:00 in the evening.

Q Around approximately 7:00 p.m. who was at your apartment?

A I was by—it was me and my—a friend of mine.

Q What was your friend's name?

A Noel.

Q How did you know Noel?

A We went to class, to English class together.

[51] Q Where was Noel from?

A I think he is from Costa Rica or Salvador. I'm not sure.

Q Shortly after Noel arrived did you receive a knock at your front door?

A Yes.

Q What did you do when you heard the knock?

A I asked who is it.

Q Did anyone answer?

A No.

Q So what did you do?

A They knocked again, and then I went to the door to open it.

Q Now, once you opened the door what happened, Mr. Rodriguez?

A When I opened the door there were three black guys in the door and they pushed me and put a gun on my stomach.

Q So there were approximately three?

A I believe there were four. I didn't see the other one.

Q What race were they?

A They were black.

Q Were they armed?

A Yes.

[52] Q The first one that came in the door, can you describe him to the Court?

A Yes.

Q Can you tell us what he looked like?

A With the big eyes, and a big nose, and very short haircut.

Q Mr. Rodriguez, would you take a look around the courtroom and see if you see that person that you just described here in court today.

A Yes.

Q Would you please point to where he is seated and describe something he has on.

A It's the one over there (indicating). He is wearing a green dress with something like gray underneath.

MR. GARDNER: Your Honor, let the record reflect the witness has identified the defendant.

THE COURT: The record will so reflect.

BY MR. GARDNER:

Q Once the robbery suspects came inside, what did they have you do?

A They lie me down on the floor and asking me where the money is.

Q Where was Noel?

[53] A He was in my bathroom. He was watching television.

Q Was he brought out into the living room where you were?

A No. After he was brought to the living room.

Q After a while did they let you—did the suspects let you stand up?

A Yes.

Q And what did they have you do?

A They told me to walk to the closet that was nearby.

Q And what happened when they got you to the closet?

A He locked me under—he put me inside the closet, on the one that I was described before, asked me to turn and load the pistol. I was afraid. I thought he was going to shoot me.

Q So did the robbery suspects, did they eventually leave the apartment?

A Yes. They put me and my friend on the closet. They put some furnitures against the door of the closet and then they left.

Q How long do you think you spent inside the apartment while the suspects were there?

A The whole time I think it was about half an [54] hour.

Q So after they were gone was anything taken from you?

A Personally, no, they didn't take anything from me.

Q What about your friend Noel?

A Yes. They took a gold chain from him.

Q Did the gold chain have anything, a charm or anything on it?

A Yes. It was a crucified, a small crucified.

Q A cross, a crucifix?

THE INTERPRETER: A cross, yes, a crucifix.

Q Did the police eventually arrive at the apartment that night?

A We were able to get out of the closet, and we looked for a friend that speak English.

Q And eventually the police did arrive there; is that correct?

A Yes.

Q Do you remember a Detective Parrales coming to the apartment there?

A Yes.

Q And did you speak to him?

A Yes.

Q And while you were there at the apartment [55] complex, did he show you some photographs?

A Yes.

Q And did you recognize anyone in the photographs?

A Yes.

MR. GARDNER: Your Honor, may I approach the witness?

THE COURT: Yes.

Q I'm going to show you what has been previously marked for ID as State's Exhibit B. Do you recognize that?

A Yes. It was the one that was showed to me before.

Q At the apartment?

A Yes.

Q And after you looked at it, did you recognize anybody on there?

A Yes.

Q And what did you do above the person that you recognized?

A I wrote my name, the date, and the time.

MR. GARDNER: Your Honor, at this time the state would move to admit State's Exhibit B as State's 2.

THE COURT: Any objection?

[56] MR. GREGORY: Objection, lack of predicate, Your Honor. He hasn't identified his name or signature or anything on this document.

THE COURT: Do you want to continue, Counsel?

MR. GARDNER: Certainly.

BY MR. GARDNER:

Q Mr. Rodriguez, whose name appears on there?

A Carlos Rodriguez, and the date, December 2, December 2 of 2004, and 9:20 in the evening.

Q And the photographs there that we have in court today, are those substantially the same as the ones you saw that night at the apartment?

A Yes.

MR. GARDNER: Your Honor, we would renew our position to admit this as State's 1.

THE COURT: Any objection?

MR. GREGORY: Yes, Your Honor. There appears to be two signatures here. He hasn't identified which one is his.

THE COURT: Do you want to continue, Counsel?

MR. GARDNER: Sure.

BY MR. GARDNER:

[57] Q Which signature is yours on this particular document?

A That is my—yes, that is my sign and that is my print name.

Q So both of those signatures are yours?

A Yes.

MR. GARDNER: We renew our position to admit it as State's 2.

THE COURT: Any objections?

MR. GREGORY: No, sir.

THE COURT: Without objection the following will be received in evidence as State's Exhibit B, as in bravo, will be received as State's 2.

(State's Exhibit No. 2 was received in evidence.)

THE COURT: Proceed, Counsel.

BY MR. GARDNER:

Q After you were there at the apartment complex, did there come a time when you got taken down to the police station?

A Yes.

Q And when you were there did you have an opportunity to look at some more photographs?

A Yes.

[58] Q And were you able to identify another one of the robbery suspects from that photograph?

A Yes.

MR. GARDNER: May I reapproach the witness, Your Honor?

THE COURT: Yes.

Q I'm going to show you what has been previously marked as State's Exhibit C. Do you recognize that?

A Yes. It is my signature and the date of the date and the time.

Q And what date and time appear on there?

A December 03, 2005.

Q What year?

A 2005.

Q Are you sure? Take a look at that.

A December 03, '05.

Q Okay. The night that you're—are those photographs that you were shown at the police station the night that your apartment was robbed?

A Yes.

Q And does that appear to be substantially the same as the one that you looked at at the police station?

A Yes. They are the same.

Q That is your signature that appears thereon?

[59] A Yes. That is my signature.

Q Of the person that you identified?

A Yes.

MR. GARDNER: Your Honor, at this time the state would move to admit State's C as State's 3.

THE COURT: Any objection?

MR. GREGORY: Just as to relevancy and materiality, Your Honor. I don't see how it relates to this VOP.

THE COURT: Anything else?

MR. GREGORY: No, sir.

THE COURT: Then over objection it will be received in evidence as State's Exhibit C, as in Charlie, as State's 3.

(State's Exhibit No. 3 was received in evidence.)

THE COURT: Proceed, Counsel.

BY MR. GARDNER:

Q Now, Mr. Rodriguez, after you looked at the photographs did you have an opportunity to actually look at a live person?

A Yes. I saw. Took a look.

Q Did you have an opportunity to observe anyone over a television monitor?

[60] A Yes.

Q How many persons did you observe over the monitor?

A One.

Q Did you recognize this person?

A Yes.

Q And who did you recognize this person to be?

A I recognized one of the robbery suspects that came into my apartment.

Q One of the robbery suspects?

A Yes.

Q After you were done there doing the identifications at the police station, did you have an opportunity to look at any jewelry?

A Yes.

MR. GARDNER: Your Honor, may I approach the witness?

THE COURT: Yes.

Q I'm going to show you what has been marked as State's Exhibit D for identification. Do you recognize that?

A Yes.

Q What do you recognize that photograph to be?

A It is a chain with crucifix, the same as the one that was took—taken from my friend.

[61] Q Does that picture fairly and accurately depict your friend's chain with the crucifix?

A Yes.

MR. GARDNER: Your Honor, at this time the state would move what has been marked as State's Exhibit D as State's 4.

THE COURT: Any objections?

MR. GREGORY: Only as to relevancy and materiality, Your Honor . . . . . my client.

THE COURT: I'm sorry, what was the last part?

MR. GREGORY: Only as to relevancy and materiality . . . . . to my client.

THE COURT: What was the last part?

MR. GREGORY: It was not found on my client.

THE COURT: And what is the relevance, Counsel?

MR. GREGORY: Your Honor, we have to prove that they committed a home-invasion robbery, and it was taken from his friend Noel, and the next witness will verify that this was actually taken from one of the suspects he identified at the scene. It was taken out of his pocket.

[62] THE COURT: Well, then over objection the Court would receive State's Exhibit D, as in delta, as State's 4.

Does that comport with the clerk?

THE CLERK: Yes, Your Honor.

(State's Exhibit No. 4 was received in evidence.)

THE COURT: Proceed, Counsel.

BY MR. GARDNER:

Q Mr. Rodriguez, are you certain that the three people you identified the night of the robbery are the ones that actually came in your apartment?

A Yes.

MR. GARDNER: I don't have any further questions, Your Honor.

THE COURT: Cross-examination.

MR. GREGORY: Thank you, Your Honor. May it please the Court.

CROSS-EXAMINATION

BY MR. GREGORY:

Q Mr. Rodriguez, good afternoon, sir.

A Good afternoon.

Q As I understand, you do not speak English; is that correct?

A That's correct.

[63] Q Okay. So when you, as you just told the Court, when you went to the door and asked who is it, you didn't say that in English, correct?

A No.

Q You said that in Spanish; is that correct?

A Yes, that is correct.

Q And you don't speak English and you don't understand English, correct?

A No. That's correct.

Q So you don't know what was said to you by any of the alleged suspects within your residence because they spoke in English, correct?

A I understand a little bit of English.

Q I'm sorry?

A I understand a little bit of English due to what I learn in the college in school.

Q Now, let's go back. I asked you a moment ago if you understood English. I thought you said you did not understand any English?

A What I mean is I'm not able to speak in English, but I understand some, the basic.

Q You understand some, the basic. You have been here one year and two months, correct?

A Yes.

Q This alleged incident occurred over a year [64] ago, correct?

A Yes.

Q Therefore you have only been here in Florida, Jacksonville, for about a month, month and a half, correct?

A Yes.

Q And you understand your English then was far less than your understanding of English now, which is still quite poor; isn't that correct?

A Yes, that's correct.

Q So you really did not understand English at all over a year ago when you first came here and you were taking English classes, correct?

A Practically nothing, yes.

Q So at the time of this situation you practically didn't understand any English at all, correct?

A I understand a little bit.

Q When you had these persons in your residence back in December of last year and you were telling them that you had just gotten paid, you were speaking in Spanish, not in English, correct?

A I said few words in English, but the rest were in Spanish.

Q And those few words you said in English you [65] don't know if those few words said in English were the correct words and the correct context or not, correct?

A I was very nervous. I didn't know what to say. I said, "No money, no money." I keep saying, "No money."

Q So how did you say it? I understand the interpretation. Did you say that in Spanish, the Spanish word for no money, no mula, or whatever?

A The only thing I said in English is "no money."

Q But isn't it correct that based on your practically no understanding of English, you cannot tell the Court now what was said to you by any of the three suspects; isn't that correct?

THE INTERPRETER: He doesn't understand. Going to rephrase.

MR. GREGORY: Sorry?

THE INTERPRETER: He doesn't understand the question. Going to refresh—to rephrase it for him so he is able to understand.

BY MR. GREGORY:

Q You could not understand what was said to you by any of the three suspects; isn't that correct?

A I only understand when they mentioned the word money.

[66] Q Was that in English or in Spanish?

A In English. They told me that in English.

Q So all you really understood was something about money; that's all you understood, correct?

A Yes.

Q You mentioned they had firearms but "they" as a plural. You don't recall how many guns you saw that day in your residence; isn't that correct?

A I was able to see two weapons.

Q Two weapons. But you don't know what kind of weapons they are, just weapons. That's all you can say; is that correct?

A They were pistols.

Q You don't know what kind of pistols they were, is that correct, or color?

A Yes. The one that was pushed against my stomach was an automatic pistol.

Q What about the other one?

A The other one was also an automatic pistol.

Q Have you seen automatic pistols before this time?

A Yes. When I was in the Army.

Q You said during direct examination you thought there were four persons?

A Yes.

[67] Q But you can only identify or remember seeing three?

A Yes, I saw three. I saw three persons that was standing in front of the door when I opened the door. I don't know if the other one was watching somewhere else.

Q Are you guessing that there was a fourth person watching or did you actually see a fourth person?

A The fourth, I didn't see the fourth person. I just watched three persons.

Q So you are really telling the court that you know that there were three persons. That's all you can say?

A Yes. I saw three persons.

Q Okay. Now, the person you identified in court today as having a green dress, from your point of view it's a green top, correct?

A Yes.

Q Now, this person that you saw—that you see now, you describe this person as being about 5' 8"; is that correct?

A More or less my same height, a little bit probably shorter than myself.

Q And how tall are you in our measurements not yours?

[68] A Yes, I'm—we use the metric system in my country. It's 175.

Q You don't know what 175 is in our measurements? If not, I'll move on.

THE INTERPRETER: He said 8.4, but I don't think that that is correct.

MR. GREGORY: I don't think so either, but we'll move on.

BY MR. GREGORY:

Q In any event, this person, how much did this person weigh; if you can in our terms, if you can?

A I believe 130, 140 pounds.

Q 130, 140 pounds?

A Yes.

Q And this person also was wearing dark pants, correct?

A Yes.

Q And a dark shirt, a dark top; is that correct?

A Yes.

Q And how old was this person?

A I believe he was 26, 25 or 26 years old, around that.

Q Did someone tell you that this person was 25 or 26 years old?

A No. That was my calculation.

[69] Q There was nothing else identifiable about this person that you recall; isn't that correct?

A No.

Q Now, when the photos were shown to you, how were they presented to you, one at a time or were they presented just as introduced in evidence on a sheet with three on top and three on the bottom?

A They show me different type of photograph.

Q Okay. Describe the different type of photograph they showed you, the photographs different from the photographs shown in court.

A They all the same with the six-person set.

Q You just said they were a different type of photograph. Now were the photographs shown to you different from what we have shown and introduced into the record a moment ago?

A I mean they show me picture from different persons, the same as those ones.

Q In what order? How were they presented to you, one after the other or were they spread in the exact same way as shown here?

A One at a time.

Q Do you recall which photograph that you—do you recall in which order did you see the photograph that you identified, like was it No. 2 or No. 3, No. 14?

[70] A To tell you the truth, I don't remember.

Q What was said to you as the photographs were shown to you?

A That if I was able to recognize any person in those photographs, I'm supposed to write down my name, my signature, the date, and the time.

Q Did you guess at any of the other photographs? Did any of the other photographs look like it could have been or may have been one of the persons that you saw? I'm referring to the first photospread shown to you.

A I look at the pictures. I only point to the person that I remember that looked like.

Q Were there any of the other five persons in—this is State's Exhibit 2. Do any of the other five persons look like or look similar to the person that you identified as being at your residence on that date in December of 2004?

A No.

Q So they all—none of them looked like the person. They were completely different pictures, they didn't look anything like the same person; is that correct?

MR. GARDNER: Objection. That was asked and answered.

THE COURT: Overruled.

[71] A No. Otherwise I would have identified more than one.

Q Just so that we're clear, so the photograph that you identified—

May I approach the witness?

THE COURT: Yes.

Q The photograph that you identified, the one that has your signature—

THE COURT: which pictures are you looking at?

MR. GREGORY: I'm sorry, Your Honor. I'm referring to State's Exhibit No. 2 for the record.

BY MR. GREGORY:

Q So the photograph that you identified on this State's Exhibit No. 2, the one that has your signature on it, was there only one other person that looked like, for example, that the person had big eyes; is that correct?

A Yes.

Q And the only one who looked like he had a broad nose?

A Yes.

Q And the only one who looked like he had short hair?

A He's not the only one that has the short hair, [72] but I was able to recognize him.

Q Looking at—

I should have asked if I could approach again. I'm sorry.

Q Looking at these six photographs, the photograph that you identified stood out from all of the others because all of the other five looked completely different from the one you identified; is that correct?

A He doesn't look so different, but I identified that because I saw him before. So I don't know what you mean by looking different.

Q Was there anything unique about the photograph that you identified that made you realize it had to be that person? What in looking at this photograph without seeing the height, without seeing the weight, without seeing their clothing, what about this photograph that was so unique that you identified it as had to be the one who was one of the

persons, one of three persons at your residence that night?

A The only thing unique is that I memorized him on my mind, and it was—yes, I remember his lips, for example, and the haircut and the big eyes.

Q Looking at this state's Exhibit 2, isn't it correct that at least five of the persons appear to have a hairstyle about the same height?

[73] A Yes.

Q And they also appear to have similar, if not the same, type of large lips?

A But the one the biggest.

Q One of the biggest but not necessarily the biggest (indicating)?

A So you can see your eyes.

Q Sorry?

A You can take a look at your eyes—at his eyes.

Q After you identified this photograph, what did the police say to you?

A I don't know. They just told me to write my name, the date, and that is it.

Q They didn't tell you you identified the right one, good job, you got the right person?

A No. They never said that.

Q They never told you that the one you identified was the one they arrested, the one they had in custody?

A No. No, they didn't say that.

Q Didn't you see this person in police custody that same night?

A Yes.

Q And did you see this person in police custody [74] that same night before you identified the photograph?

A No. It was after I identified the picture.

Q It was immediately after you identified the photograph; is that correct?

A Yes.

Q And didn't the police tell you that, yes, this is the person you identified?

A No.

Q Did you ever ask?

A No, I didn't ask.

Q How is it that you were able to identify Mr. Graham today in court?

A Because it is the same one that is in the picture.

Q So you identified Mr. Graham in court today because of having been shown this photograph again to refresh your recollection of what he looked like; isn't that correct?

A Yes.

Q So if your recollection had not been refreshed looking at these photographs, you may not have been able to identify him today; isn't that correct?

A I remember him very well. I don't think it is going to be difficult for me to identify him.

Q I don't think you answered my question. Isn't [75] it correct that having seen the photograph and having had that refresh your recollection, it enables you to identify him today because you can look at the photograph, see him, and say it's the same person; isn't that correct?

A Yes, that's correct.

MR. GREGORY: Nothing further, Your Honor. Thank you.

THE COURT: Any redirect?

MR. GARDNER: Just one question.

REDIRECT EXAMINATION

BY MR. GARDNER:

Q Mr. Rodriguez, are you certain that the person in the picture that you picked out is the same person that robbed you?

A Yes.

Q This defendant sitting in court here today?

A Yes.

Q Did this defendant have a firearm?

A Yes.

MR. GARDNER: I don't have any other questions, Your Honor.

MR. GREGORY: Your Honor, if I may?

THE COURT: All right.

RECROSS-EXAMINATION

[76] BY MR. GREGORY:

Q Which firearm are you—which firearm, which pistol are you saying that Mr. Graham had on him the day of this situation with you in December of last year?

A Automatic pistol.

MR. GREGORY: Just a moment, Your Honor.

Q I recall you saying that both were automatic pistols. Did you distinguish between the two?

A I don't understand the question?

Q When you said that the three guys had two weapons, I recall your saying that the two weapons were both automatic; isn't that correct?

A Yes.

Q Are you saying that both automatics were the same type?

A Yes. The one that I saw, yes.

Q The state just now asked you if you were able to identify the person in court today. Isn't it correct that you were told that you were coming to a violation of probation hearing today for a Terrance Graham?

A No. They never tell me that.

Q So you have no idea why you're here then? You don't know you're here for a violation of probation hearing?

A No. I didn't know that he was here.

[77] Q Why do you think you are here? What do you think this proceeding is about?

A Because the citation arrived to my house.

Q But what do you think you're here for?

A Because that is the procedure that I follow from the case, and I want to cooperate.

Q So you understand then you are here to corroborate that the person who is in court today was the person who—

THE COURT: Counsel, when you say "corroborate," I think he said "cooperate".

MR. GREGORY: I thought he said corroborate.

Which word did you use, sir? I didn't—

THE INTERPRETER: Yes. I said cooperate.

MR. GREGORY: Corroborate?

THE INTERPRETER: Cooperate.

MR. GREGORY: Thank you, Your Honor. I didn't understand the word he used.

THE COURT: That is all right.

MR. GREGORY: Good.

BY MR. GREGORY:

Q So you are saying that you are here to cooperate by identifying the person who is in court today as the person who was involved in the incident of [78] December 2004 with you, correct?

A I don't understand the question.

Q You knew when you came here today that you were going to—that one of the persons who was arrested for the crime against you in December 2004 would be here; isn't that correct?

A I didn't know.

Q No one told you how the defendant would be here, where he would be sitting with his attorney, no one told you anything like that ever?

A No, nobody told me.

Q Coming here and seeing him is the first you realized that he would be here; is that what you are telling this Court?

A Yes.

Q When you got the subpoena or notice to appear, didn't it say State of Florida versus Terrance Graham, Terrance Jamar or J. Graham, your appearance is required for that hearing. Didn't that notice tell you that?

THE COURT: In what language, counsel?

THE GREGORY: I don't know yet.

THE INTERPRETER: I ask this witness the language, Your Honor?

THE COURT: Go ahead and just ask the question as he is asking it.

[79] (The interpreter translates the question.)

A No.

Q The document that you received, was it in English or in Spanish?

A In English.

Q Were you able to read it?

A I had a friend that reads English very well and he translated to me.

Q You didn't bring that with you today?

A No, I didn't.

Q The one that you—what was read to you the reason for being here, the case name, that kind of thing?

A He told me that I had the citation and the court and he gave me the time.

Q That's all that was read to you?

A Yes. That's what he said in the document.

Q And the state attorney never spoke with you about what was going to happen today?

A No.

MR. GREGORY: Nothing further, Your Honor.

THE COURT: Anything else for this witness?

MR. GARDNER: No, sir, Your Honor.

THE COURT: All right. May this witness be excused?

[80] MR. GARDNER: Yes, sir, Your Honor.

THE COURT: Thank you very much, sir.

THE INTERPRETER: Thank you, Your Honor.

(Witness excused.)

THE COURT: Call your next witness.

MR. GARDNER: Detective Parrales.

THE COURT: Will we need the interpreter for anything else?

MR. GARDNER: No, sir, Your Honor.

THE COURT: Thank you very much, sir.

THE INTERPRETER: Thank you, Your Honor.

MR. GREGORY: . . . and I don't believe my client will be taking the stand either, sir.

THE COURT: We can cross that.

MR. GREGORY: Yes, sir. I'm just giving you a time line for . . .

THE COURT: I appreciate it.

MR. GREGORY: Yes, sir.

THE COURT: Detective, if you will come down to this area here where the bailiff is standing. If you would face me and place your left hand on the Bible and raise your right hand to be sworn.

Do you swear or affirm that the testimony you are about to give in this cause will be [81] the truth,

the whole truth, and nothing but the truth so help you God?

THE WITNESS: Yes, sir.

THE COURT: Please have a seat.

Proceed, Counsel.

CESAR PARRALES,

having been produced and first duly sworn as a witness on behalf of the state, testified as follows:

DIRECT EXAMINATION

BY MR. GARDNER:

Q Can you tell us your name, please.

A Yes. My name is Cesar Parrales.

Q Where are you employed?

A I work for the Jacksonville Sheriff's Office.

Q What is your current position?

A Currently I'm assigned as a detective in the homicide unit.

Q Back in December of 2004, what was your assignment back then?

A Back then I was assigned to the sex crimes unit, but I was temporarily assigned to a task force, task force with the robbery unit.

Q And what was the purpose of the task force?

A During this time there was a series of home-invasion robberies to Spanish victims, and so they [82] put a task force together to investigate these crimes.

Q And I assume you speak Spanish?

A That's correct.

Q And you were able to communicate with the victims and witnesses?

A That's correct.

Q Now, during your duty on the task force did you have an opportunity to aid in the investigation and arrest of a person by the name of Terrance Graham on December 2nd 2004?

A Yes, sir.

Q Do you see him here in the courtroom today?

A Yes, I do.

Q Would you please identify where he is seated and an article of clothing he has on.

A Yes, sir. I do see a young black male wearing the green outfit with the—looks like a gray sweatshirt underneath.

MR. GARDNER: Your Honor, let the record reflect the witness has identified the defendant?

THE COURT: The record will so reflect.

BY MR. GARDNER:

Q And what county and state did this crime occur in?

[83] A Duval County, Florida, sir.

Q Now, back on December 2nd, did you actually respond to the crime scene there?

A One of them, yes.

Q Which one was that?

A The apartment complex located on Barnhill Road.

Q Did you have an opportunity to come into contact with a Carlos Rodriguez?

A Yes, I did.

Q And did you have an opportunity to speak with him about the crime?

A Yes, I did.

Q And during that time did you have an opportunity to show him any photospreads of any potential suspects?

A Yes.

Q Was the defendant one of those?

A Yes, it was.

MR. GARDNER: Your Honor, may I approach the witness?

THE COURT: Yes.

Q I'm going to show you what has been marked into evidence as State's Exhibit 2. Do you recognize that?

[84] A Yes, I do.

Q What do you recognize that to be?

A It is a series of photographs, photospread that we used during the investigation.

Q Whose picture appears in the photospread?

A Terrance Graham.

Q And is that a copy of the photospread you showed to Mr. Rodriguez?

A Yes.

Q And what did you tell Mr. Rodriguez before you showed it to him?

A I instructed him to look at the photospread, to look at it carefully; that the suspect may or may not be on the photospread, and if he saw someone that he recognized, to point it out to me.

Q And did he recognize someone?

A Yes, he did.

Q And who did he recognize?

A He recognized the—on the second line the first black male.

Q And who is that?

A Terrance Graham.

Q How long did it take to point him out?

A He picked him out immediately.

MR. GARDNER: Your Honor, may I approach the [85] witness?

THE COURT: Yes.

Q Now, after you were there at the scene, did you take Mr. Rodriguez down to the police station?

A Yes.

Q Did you have an opportunity to show him a photospread containing a picture of Meigo Bailey?

A Yes, we did.

Q Can you tell the court what you explained to him prior to showing him the photospread.

A I gave him the same instructions as before to look at the pictures carefully, that the subject may or may not be in the photospread.

MR. GARDNER: May I reapproach the witness, Your Honor?

THE COURT: Yes.

Q I'm going to show you State's 3. Does that appear to be a similar copy of the photospread you

showed to Mr. Rodriguez the night at the police station?

A Yes, it is.

Q And did he identify anybody from that photospread?

A Yes, he identified Meigo Bailey.

Q And what did you have him do once he identified him?

[86] A I had him sign his name, date it, and put the time.

Q How long did it take for him to identify Mr. Bailey?

A It was instant. He immediately picked him out.

Q Now, during the course of the investigation that night did you have another potential suspect name that was in custody?

A Yes, we did.

Q And who was that?

A Kirkland, Lawrence Kirkland.

Q And at that particular time did you conduct any type of identification procedures with Mr. Rodriguez and Mr. Lawrence?

A I'm sorry. I don't understand your question.

Q Did you conduct any type of identification procedure where Mr. Rodriguez was able to attempt to identify Mr. Lawrence?

A Oh, yes. I'm sorry.

Q That is all right.

A Lawrence Kirkland was placed in an interview room in the homicide unit. This unit—this room is equipped with videocameras, so he was able to ID him through a TV monitor.

[87] Q What did you tell him before he looked at him?

A I again explained to him that to look at this individual and see if he recognized him.

Q And did he recognize Mr. Lawrence?

A Yes, he did.

Q After Mr. Lawrence was taken into custody was anything recovered off his person?

A Yes, there was.

Q What was recovered off of Mr. Lawrence's person?

A He had a chain with a small necklace, cross—sorry, cross pendant on the necklace and some U.S. currency.

MR. GARDNER: Can I approach the witness, Your Honor?

THE COURT: Yes.

Q I'm going to show you what has been admitted as State's 4. Do you recognize that photograph?

A Yes, I do.

Q What do you recognize it to be?

A It's a gold necklace with a small cross pendant on it.

Q Is that the one you recovered off of Mr. Lawrence that night?

A Yes, it was.

[88] Q Did you have an opportunity to show that to Mr. Rodriguez and who you thought to be Walter Balderas that night?

A Yes.

Q Did either one of them identify that as theirs?

A Yes, they did.

Q Now, several days after this did you have an opportunity to sit in on an interview with Meigo Bailey?

A Yes, I did.

Q Where was that conducted at?

A That was in a hospital room over at Shands Hospital.

Q And were you there when he was questioned?

A Yes, I was.

Q And did he make any admissions regarding the Barnhill robbery?

A Yes.

Q Did he say who he was with?

A Yes. He said that he was there with Terrance Graham and Kirkland, Lawrence Kirkland.

And did he say whether or not they were armed?

A Yes. They were armed with a pistol.

MR. GREGORY: Objection, hearsay, Your Honor . . .

[89] THE COURT: Overruled.

MR. GARDNER: I don't believe I have any other questions, Your Honor.

THE COURT: Any cross?

MR. GREGORY: Thank you, Your Honor. May it please the Court.

CROSS-EXAMINATION

BY MR. GREGORY:

Q Almost good evening.

A How are you doing, sir?

Q Fine, sir.

Now, Terrance Graham is about 5' 6", correct?

A I think so.

Q And again, according to your same report, he weighs about 165 pounds, correct?

A Yes.

Q And the night that he was arrested, the night that he fled, et cetera, he had on baby blue shorts and a short shirt, an outfit, correct?

A I can't remember specifically what he was wearing.

Q But you took his clothing though, correct?

A I don't recall.

Q So you're not saying he didn't have that on; you just don't immediately recall what he had on?

[90] A I can't remember, sir.

Q And your reports would show what he had on, wouldn't they?

A They should, yes.

Q You have that with you; you can look at it real quickly?

A I don't have the arrest and booking reports, sir.

Q Do you recall him having on an outfit?

A Yes.

Q Do you recall it being light colored?

A I can't recall, sir.

Q The photograph that you got, where did you get the photographs of Terrance Graham from, referring to the photospread?

A I can't testify to that because I didn't put the photospread together.

Q Who did collect the photospread—photospreads? There was actually two.

A It was—there were three of us that were working on the task force together. It would have been Detective Kee or Detective Padgett.

Q One of the others; it wasn't you?

A That's correct,

Q And Mr. Rodriguez did not speak any English, [91] did not understand any English, correct?

A That's correct.

Q So before you got there you don't know what he was able to communicate to any of the other officers because he must have been speaking in Spanish or speaking English. You don't know what their communications were, correct?

A I believe there was a patrol officer there or one of the neighbors that was assisting the patrol officers in translating for the victims.

Q This is what you were told after the fact; is that correct?

A After what fact?

Q This is what you were told later, but you weren't there?

A At the scene? No. I was there shortly after the home-invasion robbery took place.

Q But to assist in the communication before you arrived you were told that there was a neighbor or someone else helping, but you don't know because you didn't—you weren't there to witness that, correct?

A No. I was there, yes.

Q Do you recall seeing a neighbor or someone help translate?

A Yes.

[92] MR. GREGORY: No other questions, Your Honor.

THE COURT: Any redirect?

MR. GARDNER: No, sir, Your Honor.

THE COURT: May this witness be excused?

MR. GARDNER: Yes, sir, Your Honor.

THE COURT: Thank you very much, Detective.

THE WITNESS: Yes, sir.

(Witness excused.)

THE COURT: Call your next witness.

MR. GARDNER: Detective Brian Kee.

THE COURT: All right. And we have all of the evidence back to the clerk, right?

MR. GARDNER: I believe so.

THE COURT: All right, call your next witness.

MR. GARDNER: Brian Kee.

THE COURT: Brian Kee.

Sir, if you will face me and then place your left hand on the Bible and raise your right hand to be sworn.

Do you swear or affirm that the testimony you are about to give in this cause will be the truth, the whole truth, and nothing but the truth so help you God?

THE WITNESS: I do.

[93] THE COURT: Have a seat and we will adjust the mic for you.

Proceed, Counsel.

BRIAN KEE,

having been produced and first duly sworn as a witness on behalf of the state testified as follows:

DIRECT EXAMINATION

BY MR. GARDNER:

Q Would you tell us your name, please.

A Brian Kee.

Q And where are you employed?

A Jacksonville sheriff's office.

Q How long have you been there?

A For over nine years.

Q What is your current assignment?

A Robbery unit.

Q And back on December 2nd, 2004, what was your assignment?

A The robbery unit.

Q Did you have any special assignment at that time?

A I was part of the Hispanic home-invasion task force.

Q During your duties on the task force did you have an opportunity to participate in the investigation [94] and arrest of a Terrance Graham?

A Yes.

Q Do you see him here in the courtroom?

A Yes. He is in the green jumper.

MR. GARDNER: Your Honor, let the record reflect the witness has identified the defendant.

THE COURT: The record will so reflect.

BY MR. GARDNER:

Q Now, back on December 2nd of 2004, did you actually have an opportunity to come in contact with the defendant?

A Yes.

Q And where was that at?

A I interviewed him in the homicide office.

Q And when you met with him, did you advise him of his rights prior to speaking with him that evening?

A Yes.

Q Can you just tell the court briefly how that went.

A I had a constitutional rights form. I went over the form with him. I got his name, time, and where

we were. And I asked if he was under the influence of any drugs, alcohol, medications. He stated he was not I had him read the first line out loud, and [95] then I read each line individually to him, asked him if he understood and if he stated that he understood, he would put his initials off to the side of the bullet.

And then once I read the whole thing, I asked him if he understood, had any questions, and asked him to sign it. He signed it, and then I asked if he was willing to talk to me. He stated that he was.

Q Did he ever ask for a lawyer?

A No, not—at the end of the interview he did, yes.

Q But at that time he agreed to speak with you?

A Yes.

Q Now, when you were there did you ask him about the Barnhill robbery and another robbery at Art Museum Drive?

A Yes.

Q Can you tell the court how you—how that went. What did you exactly ask him?

A First we went over the—well, he had an idea why he was there. I asked him—first I asked him what he was doing that night, and he stated—he gave a story that he was in his father's black Cadillac and he had picked up a boy named Meigo who had been shot. He just saw him on the side of the street. Picked

him and Lawrence up and dropped them off at the hospital, and [96] then the police chased him from the hospital and he was caught by the police.

Then I—obviously that wasn't—we knew there was more to it, Detective Parrales and I kept questioning him and asked him about the two robberies and told him he had been identified by the victims in the home-invasion robbery on Barnhill, asked him about the shooting at Art Museum at which—where Bailey was shot. And I told him that we also had information that he was involved in these incidents from the phone records of some of the victims in other cases.

Q But did he ever make any admissions as to the Barnhill robbery?

A The closest thing he came to an admission was when we were talking about this, I asked him—aside from the two—we were talking about a number of different—he started to go into some other cases. And I asked him, "Aside from the two robberies tonight how many more were you involved in?" And he responded, "Two to three before tonight."

Q All right. But that was after you asked him other than the two tonight?

A Yes. He didn't get real specific on the two incidents that night.

MR. [GARDNER]: I don't believe I have any other [97] questions, Your Honor.

THE COURT: Any cross?

MR. GREGORY: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. GREGORY:

Q Good afternoon, sir. Mr. Graham is about 5' 6"; isn't that correct?

A I—looking at the report, yes, I think that's about right. Yes.

Q Your report showed he is 5' 6", right?

A Yes.

Q 165 pounds, correct?

A Yes.

Q And 04/87, so at the time he was 17 years old; is that correct?

A Right.

Q Now, he also had on a baby blue outfit, baby blue shorts and a baby blue short shirt; isn't that correct?

A I don't remember that now.

Q You don't have in your report what he had on that night that you apprehended him or were involved in his arrest?

A No.

Q There are no notes at all showing what he had [98] on?

A No.

Q Weren't his clothing taken from him that night?

A I believe it was. I remember after looking at the video of him and his father talking in the room he had what looked to be like a white T-shirt on, dirty white T-shirt. That's just because of what I saw in the video.

Q Who took his clothes?

A I'll have to look and see.

Q Would you do so.

A Pardon me?

Q Would you do so, looking at the report, sir?

A Sure.

Q Thank you, sir. And as you look for that if you see in there the clothing or description of clothing, I'd appreciate you telling me the same.

A I've got two cases to look in here, so . . .

Q Yes, sir.

A I don't have any property list of his clothing. I've got the clothing that was recovered from the scene at Art Museum Drive and the jersey, the clothing that may have come from in and around the

vehicle, but I don't have any—I know I personally [99] didn't put his clothing in the property room.

Q You don't know who did?

A No, I don't.

Q But it is in the property room somewhere?

A That is my understanding, but I don't have documentation of that, so I'm speculating it is in the property room.

Q But at no time that night did you see Mr. Graham in any dark clothing, dark pants, dark top, correct?

A From what I recall after looking at the video, he had like a dirty white T-shirt on, but it was December, so I don't know if he had outer clothing or not.

Q But again, the question is at no time that night did you see him wearing any dark-colored clothing, dark pants—

A I don't remember. I don't remember that.

MR. GREGORY: No other questions, Your Honor.

THE COURT: Any redirect?

MR. GARDNER: No, sir, Your Honor.

THE COURT: May this witness be excused?

MR. GARDNER: Yes, sir.

THE COURT: Thank you very much, sir.

(Witness excused.)

[100] THE COURT: Call your next witness.

MR. GARDNER: Detective Kobylarz.

THE COURT: Detective Kobylarz.

Thank you. If you would come down to this area here where the bailiff is holding up his hand. And if you'll face me and place your left hand on the Bible and raise your right hand to be sworn. Right here.

Do you swear or affirm that the testimony you are about to give in this cause will be the truth, the whole truth, and nothing but the truth so help you God?

THE WITNESS: Yes, sir, I do.

THE COURT: If you will have a seat. We will adjust that mic for you.

MR. GARDNER: May I proceed?

THE COURT: Yes.

SHAUN KOBYLARZ,

having been produce[d] and first duly sworn as a witness on behalf of the state, testified as follows:

DIRECT EXAMINATION

BY MR. GARDNER:

Q Tell us your name, please.

A My first name is Shaun, and my last name is Kobylarz.

[101] Q Where are you employed?

THE COURT: Spell your last name for us.

THE WITNESS: Yes, sir. It's K-o-b-y-l-a-r-z.

THE COURT: Proceed, counsel.

Q Where are you employed?

A Jacksonville Sheriff's office, crime scene detective.

Q How long have you been a crime scene detective?

A Almost two years.

Q Now, back on December 2nd, 2004, were you on duty?

A Yes, sir, I was.

Q Did you have an opportunity to respond to the end of a fleeing or a car chase on Ring Lane?

A Yes, sir, I did.

Q And when you got there what was the first thing that you did when you got there?

A I took photographs of the vehicle, and there were some guns inside the car.

MR. GARDNER: Your Honor, may I approach the witness?

THE COURT: Yes.

Q I'm going to show you what had been premarked as State's Exhibits F, G, and H. Do you recognize those [102] three?

A Yes, sir, I do.

Q And what do you recognize those to be?

A Pictures that I took at the scene.

Q Is that the black Cadillac that you saw there that night?

A Yes, sir.

Q And the guns that you found in the car?

A Yes, sir.

Q And do those pictures fairly and accurately depict the contents therein?

A Yes, sir, they do.

MR. GARDNER: Your Honor, the state would move what has previously been marked as State's Exhibits F, G, and H and as the next sequentially numbered exhibits.

THE COURT: Any objections?

MR. GREGORY: May I see them first.

Your Honor, if I can have a voir dire or just issue an objection based on lack of predicate to these three coming in as a composite exhibit.

THE COURT: I'm not following you.

MR. GREGORY: I'm sorry?

THE COURT: If you want to voir dire, you [103] can voir dire.

MR. GREGORY: I can voir dire or I can object based on lack of predicate as to these three coming in as a composite exhibit.

THE COURT: That is up to you, counsel.

MR. GREGORY: Not a problem. I have no objection to Exhibit F, and I'll voir dire to the other two if we can do it that way.

THE COURT: Then without objection Exhibit F, as in fox trot, will be received as State's 5.

Does that comport with the clerk?

THE CLERK: Yes, Your Honor.

(State's Exhibit No. 5 was received in evidence.)

THE COURT And you want to voir dire as to G and H?

MR. GREGORY: Yes, sir, if I may.

VOIR DIRE EXAMINATION

BY MR. GREGORY:

Q Exhibit G, which purports to have what appear to be two firearms in a seat—

A Yes, sir.

Q —do you know at what point those firearms got to that seat?

[104] A I have no idea, sir.

Q At what point did you arrive at the scene?

A At the point when called after the vehicle had crashed.

Q Do you know how long after the vehicle crashed that you arrived?

A Not exactly, no.

Q Do you know if there were any officers who had put—had moved the firearms around in the car? You have no idea of any of that?

A I have no idea, sir.

Q You just photographed what you saw at the time you saw it?

A Yes, sir.

Q And you didn't check for prints on any of these items?

A No, sir.

Q And as to Exhibit H, which purports to be a firearm on the floorboard apparently of the passenger side, is that correct—

A Yes, sir.

Q —the same situation, you just took a photograph of what you saw?

A Yes, sir.

Q Don't know when it got there? You don't know [105] when the firearm got in that position?

A No, sir.

Q Don't know who put it there?

A I have no idea.

Q And no one told you who put it there—

A No, sir.

Q —for either exhibit? And you didn't take prints on the—of the firearm in State's Exhibit H; is that correct?

A Yes, sir.

MR. GREGORY: Your Honor, I object to relevancy and materiality.

THE COURT: What is the relevance, counsel?

MR. GARDNER: Your Honor, we have to prove in this particular case that the defendant was

in possession of a firearm. This is—or while he was on probation the vehicle crashes. What he has already admitted to is the fleeing. This is the vehicle that he fled in, and these are the firearms that were located in the car after he bailed out from the driver's seat, so I think they are highly relevant in addition to show and to corroborate the testimony by Mr. Rodriguez if [106] there was a firearm used in this case. Shortly later we have firearms found in the defendant's vehicle.

MR. GREGORY: Your Honor, if I may just speak first to my objection?

THE COURT: Sure.

MR. GREGORY: Your Honor, all this witness can say is that when he got to the scene at some point later these firearms were there. He could not say when they were there. This doesn't show or disprove that my client had any possession of anything. Plus, there is more than one person who fled from the vehicle according to the information . . . one person in the vehicle.

So that doesn't show that my client had possession or knowledge of any of these three firearms.

THE COURT: I understand. Well, that would go to its weight, not its admissibility.

MR. GREGORY: Yes, sir.

THE COURT: Then at this time the court would receive in evidence over objection the following: State's Exhibit G, as in Golf as State's Exhibit 6; H as in . . . . . as State's [107] 7.

(State's Exhibits Nos. 6 and 7 were received in evidence.)

DIRECT EXAMINATION CONTINUED

BY MR. GARDNER:

Q Do you recall what the caliber of these firearms were?

A One was a .380. One of them was a .38, and one was a .45.

Q Out of those three are any of them automatics, semiautomatic?

A Yes, sir.

Q And which ones are those?

A It should be the .380 and the .45.

Q And once you collected those particular items, where did you take them?

A I took them to the property room.

MR. GARDNER: Your Honor, may I approach the witness?

THE COURT: Yes.

Q I'm going to show you State's Exhibits I, J, and K. Are these photographs the same firearms that you put in the property room with the CCR number and your initials?

A Yes, sir, they are.

[108] Q Are those the same firearms that you collected from that vehicle and submitted into evidence at the property room?

A Yes, sir, they are.

MR. GARDNER: Your Honor, at this time the state would admit State's Exhibits J, K—I, J and K as the next numbered sequential exhibits.

THE COURT: Any objections?

MR. GREGORY: If I may voir dire?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. GREGORY:

Q As to State's Exhibit I, what type of firearm is that?

A It's a .38.

Q That is not automatic, correct?

A No, sir. It's a revolver.

Q As to State's Exhibit J, whichever firearm is that?

A That is the .45.

Q The .45?

A I believe so.

Q Well, counsel referred to it as automatic or semiautomatic. Which one is it?

[109] A It is probably semiautomatic.

Q So it's not an automatic but semiautomatic?

A Semiautomatic, yes, sir.

Q State's Exhibit K for identification; is that a semi or an automatic?

A Semiautomatic.

Q what type of firearm is that?

A That's a .380.

Q What is the main difference between an automatic and a semiautomatic in this context?

A Most people say a semiautomatic, it fires every time you pull the trigger. An automatic would fire several times as you pull the trigger one time.

Q And they are clearly different from sight? Can you look at the firearm by sight to clearly tell whether one is a semiautomatic versus one is an automatic?

A I probably could not, no.

Q But you can?

A No.

MR. GREGORY: Nothing further, Your Honor.

THE COURT: All right. Any objections to the exhibits?

MR. GREGORY: No other objections, Your Honor, other than—no other objections, Your [110] Honor, and relevance and materiality I earlier addressed as to the firearms in the car.

THE COURT: Well, assuming that this is all going to be tied up at some point, I'll allow the evidence in. State's Exhibit I, as in India, will become State's 8. J as in Juliet 9; K as in kilo 10.

Does that comport with the clerk?

THE CLERK: Yes, Your Honor.

(State's Exhibits Nos. 8, 9, and 10 were received in evidence.)

MR. GARDNER: Your Honor, may we approach briefly?

THE COURT: For what purpose?

MR. GARDNER: I'm not sure. Did you mean wrap things up or tie it up to the vehicle? I wasn't sure.

THE COURT: No. When I said assuming that this would all be tied up, you're going to be able to tie it up together as to somehow to the defendant. I'll allow it in.

MR. GARDNER: Okay.

THE COURT: Because you've met the predicate, but in terms of what weight I'll give it has yet to be determined.

[111] MR. GARDNER: Okay. It would be my mistake releasing the officers that actually saw him get out of this vehicle and flee.

THE COURT: I can't try your case for you.

MR. GARDNER: I understand. Yes, sir.

THE COURT: Anything else from this witness?

MR. GARDNER: I'm sorry, Your Honor. Yes, sir.

THE COURT: May he be excused?

MR. GARDNER: Yes, sir.

THE COURT: Thank you very much, sir.

(Witness excused.)

THE COURT: Call your next witness.

MR. HOLLIDAY: Your Honor, the state would call Officer M. F. Edwards.

THE COURT: All right, Officer M. F. Edwards. Officer Edwards, if you will come down to this area here, please. If you will face me and place your left hand on the Bible and raise your right hand to be sworn.

Do you swear or affirm that the testimony you are about to give in this cause will be the truth, the whole truth, and nothing but [112] the truth so help you God?

THE WITNESS: Yes, Sir.

THE COURT: All right, sir, take a seat and we'll adjust that mic for you.

Proceed, counsel.

MATTHEW EDWARDS,

having been produced and first duly sworn as a witness on behalf of the state, testified as follows:

DIRECT EXAMINATION

BY MR. HOLLIDAY:

Q Officer Edwards, could you please spell your name for the record, please, full name.

A Officer Matthew, M-a-t-t-h-e-w, Edwards, E-d-w-a-r-d-s.

Q Sir, what is your occupation?

A Police officer with the Jacksonville Sheriff's Office.

Q And how long have you been so employed?

A As a police officer six years.

Q And so you were so employed last December 2nd, 2004?

A Yes, sir.

Q Sir, on December 2nd, 2004, did you have occasion to come into contact with a person by the name of Kirkland Lawrence?

[113] A Yes, sir.

Q All right. Do you recall what the nature and circumstances of that contact was?

A Yes, sir.

Q Could you describe for the court what that contact was?

A I was dispatched to Memorial Hospital to provide backup for an off-duty unit who had a party drive up and drop off a shooting victim.

Q Let me stop you for a second. Do you recall the name of that person who was shot or that shooting victim?

A The last name is Bailey I believe.

A Do you recall what the first name was?

A Meigo, or Meiko. I can't . . .

Q If I say the name for you, would you understand it or would you remember it?

A I believe so.

Q Meigo Bailey?

A That sounds right, yes, sir.

Q All right, sir. So I will continue. What was the nature of your contact with Mr. Kirkland Lawrence?

A When I arrived, Mr. Lawrence was detained in the back seat of the off-duty police officer's police car. And he advised me that there was one person inside [114] with a gunshot wound and that Mr. Lawrence had been detained because he was part of the party that dropped him off, and then the other party in the vehicle fled the area.

Q At some point on December 2nd, 2004, did you actually arrest Lawrence Kirkland—excuse me, Kirkland Lawrence?

A I didn't do the physical arrest. I transported him to the police station.

Q At any point did you search Kirkland Lawrence?

A Yes, I did.

Q And can you describe for the Court that search. What did you do?

MR. GREGORY: Objection as to relevance, materiality. There is no tying this to my client.

THE COURT: I don't know yet, counsel. At this point it's overruled.

MR. GREGORY: Yes, sir.

MR. HOLLIDAY: You can continue, sir.

A I was asked to transport Mr. Lawrence to the police station for an interview. I took him out of the off-duty officer's police car and searched him prior to putting him in my car.

Q And during that search did you find anything?

[115] A Yes, sir.

Q What did you find?

A I don't recall exactly which pocket without the paperwork, but in one of his pockets I recovered a gold necklace with a cross on it and some cash.

Q And do you recall how much cash it was?

A I believe $12.00.

MR. HOLLIDAY: Just a moment, Your Honor.

(Mr. Holliday and Mr. Gardner confer.)

MR. HOLLIDAY: Your Honor, permission to approach the witness if I could?

THE COURT: All right.

(Mr. Holliday furnishes document to Mr. Gregory.)

MR. GREGORY: Yes, sir. Thank you, sir.

BY MR. HOLLIDAY:

Q Officer, I'm showing you what has been entered into evidence as State's Exhibit 4. Can you look at that, please.

A Yes.

Q What do you know that to be?

A It appears to be the gold necklace with cross that I removed from Mr. Kirkland's pocket.

MR. HOLLIDAY: Thank you, sir.

Your Honor, no further questions for this [116] witness.

THE COURT: Any cross?

MR. GREGORY: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. GREGORY:

Q Did you see Terrance Graham that night?

A I didn't have any direct contact with Mr. Graham, no, sir.

Q But did you see him that night though?

A I may have seen him at the police station. I don't remember if I saw him or not. I was assigned to escort a different person.

Q You don't remember anything he had on?

A No, sir.

Q What time did you see Terrance Graham that night?

A I don't recall seeing—I don't know that I specifically saw him at all that night.

MR. GREGORY: Thank you.

Your Honor, again, I would move to strike due to lack of relevance and materiality . . . . . relating to my client.

THE COURT: Counsel, I haven't heard all of the testimony yet, I assume, so . . .

MR. GREGORY: I'm sorry. I thought I . . .

[117] THE COURT: . . . at this point.

MR. GREGORY: Yes, sir.

MR. HOLLIDAY: Would you like the state to address that?

THE COURT: No. I want you to just prove your case up if you can.

MR. HOLLIDAY: No further questions.

THE COURT: If you have any redirect for this witness, go ahead.

MR. HOLLIDAY: No redirect, Your Honor.

THE COURT: All right. You're excused, sir.

(Witness excused.)

THE COURT: Call your next witness.

MR. GARDNER: Your Honor, that concludes the state's case.

MR. GREGORY: That was my understanding, Your Honor. That is why made an objection then. I renew it now without speaking to it.

THE COURT: Now that the state has rested its case, what was the relevance of Officer Edwards' testimony?

MR. HOLLIDAY: Officer Edwards, Your Honor, has testified to the necklace being removed from Kirkland Lawrence.

[118] THE COURT: Right.

MR. HOLLIDAY: Kirkland Lawrence was identified as a person in conjunction with the defendant as being participating in the home-invasion robbery.

THE COURT: That was through Mr. Rodriguez?

MR. HOLLIDAY: Yes, sir. So that being said, the property being removed from Lawrence Kirkland is very relevant—Kirkland Lawrence rather, is very relevant in terms of proving that property was taken from the scene of the crime, Your Honor.

THE COURT: All right.

MR. GREGORY: Your Honor, a necklace in Lawrence's possession taken from a victim doesn't show that Graham took the necklace or was involved in the necklace being taken or had knowledge of it. It's not relevant. It's a different person, different crime, different charge.

THE COURT: Well, no, Counsel. The robbery isn't necessarily an individual act.

MR. GREGORY: Yes, sir.

THE COURT: Mr. Rodriguez' testimony was [119] that a group of individuals robbed them and that during the process of the robbery there was a necklace with a crucifix taken and that he later identified it taken off from one of the other victims, I believe is the testimony, and I'll go back and look at the transcript.

MR. GREGORY: Yes, sir.

THE COURT: And that he identified the necklace.

MR. GREGORY: I have a different recollection, but I'll defer to the transcript, and I understood that at this point—

THE COURT: Well, what is your recollection?

MR. GREGORY: My recollection, Your Honor, is that Rodriguez spoke to his understanding of what occurred as to Balderas, but of course Balderas didn't testify as to what did or did not

happen, and my recollection is that for the most part Rodriguez spoke to what occurred to him directly, and his understanding as to others is hearsay and hearsay as to what was or was not taken from Balderos [sic] and that Rodriguez did [120] not say that Graham was present or even in the immediate vicinity of anything taken from Balderos [sic], the person who has not testified.

THE COURT: Well, I'll go back and look at the transcript.

MR. GREGORY: Yes, sir.

Other than that, Your Honor, my understanding—and correct me if I am wrong—is that at this point having admitted to the violation of probation, having heard everything, at this point we don't need closing arguments. We would save that for the sentencing, whenever that would be. Unless you want to hear everything, so we would stop at this point—

THE COURT: Well, if you want to argue as to whether or not they have proved up the allegations, the remaining allegations in the violation now is the time unless there is any—and you need to talk to your client. First of all, we are still in the case, Counsel.

MR. GREGORY: Yes, sir.

THE COURT: If you want to talk to your client and see if he wants to testify as to the other allegations that were in the [121] violation.

MR. GREGORY: He has already given me the answer expressed before, which is he does not want to testify to the allegations.

THE COURT: Is that right, sir?

MR. GREGORY: You need to stand up, sir.

THE DEFENDANT: Yes, sir.

THE COURT: Is that right, Mr. Graham?

THE DEFENDANT: Yes, sir.

THE COURT: Because you understand if you do want to testify, you have the right to testify and no one can make that decision except you. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And you have thought it through and decided you don't want to testify in your VOP hearing?

THE DEFENDANT: Yes, sir.

THE COURT: All right, sir. That is certainly your right.

All right, go ahead and have a seat.

MR. HOLLIDAY: Just for clarity, Your Honor, you are going to reserve ruling then until you have checked the transcript on the relevancy of the necklace, I believe?

[122] THE COURT: I'm going to reserve ruling on whether or not I even find there is a violation, Counsel, based on the evidence presented.

MR. HOLLIDAY: Yes, sir.

THE COURT: I'll go back and read the transcript and see if it comports with my recollection. If it doesn't, I'll look at it.

MR. HOLLIDAY: Yes, sir.

THE COURT: Anything else?

MR. GARDNER: Nothing from the state, Your Honor.

(Discussion off record.)

THE COURT: I'll pass it to January. Which is better for you? Didn't I pass another case for you?

MR. GREGORY: The 4th, yes, sir.

THE COURT: The 4th?

MR. GREGORY: Yes, sir.

THE COURT: We'll pass this to January 4th.

MR. GREGORY: Yes, sir. You will still be in this courtroom, sir?

THE COURT: Yes.

MR. GREGORY: Thank you, sir.

[123] THE COURT: Yes.

The Court will take the case under advisement.

And there is no further argument, is that right? Is that what I'm hearing from both sides?

MR. GARDNER: I was prepared to provide some argument to the Court, Your Honor.

THE COURT: Well, let's go ahead and do it now.

MR. GARDNER: I'd like to highlight some of the facts that the state believes came out during this particular hearing.

The state has to show that the defendant violated condition three by owning, possessing, or carrying a firearm and condition four, that he commited [sic] the offense of home-invasion robbery and condition five, that he associated with known criminals.

We believe that we have proven that in this case by a preponderance of the evidence, the greater weight of the evidence that this defendant—

THE COURT: Well, break it down for me and tell me how.

[124] MR. GARDNER: As far as the possessing or carrying a firearm, we had the direct testimony of Mr. Rodriguez, the victim in this case, who identified Mr. Graham in Court. He identified him from a photospread, and he clearly indicated that he was certain that he possessed what appeared to be to him an automatic pistol that night, a pistola as he

said. That would be our basis on this particular point for violation of condition three.

As far as the home-invasion robbery, there has been evidence that this was Mr. Rodriguez' apartment. That was his home. He heard a knock on the door. He opened the door. They forced their way in with a gun in his stomach. He remembers hearing, Money, where is the money, even though his English is not that good.

He recalls there being a necklace taken from his friend Noel and then putting him in a closet and then fleeing the scene.

Later on that particular evening, shortly after the robbery, Detective Parrales arrived. He showed him a photospread of Terrance [125] Graham. He positively identified him shortly after the robbery as the person that—was one of the persons that came in the apartment and had a firearm and demanded money.

The other evidence in this case shows that Kirkland Lawrence and Meigo Bailey were also identified by Mr. Rodriguez as participating in this robbery the same night that it happened, Mr. Bailey by photospread and Mr. Lawrence by a show-up.

It is important that the defendant is seen to be with—or identified as being in the robbery with these two individuals because Officer Edwards testified that he found the gold chain with the crucifix on Mr. Lawrence's person, and that was subsequently shown

to Mr. Rodriguez and the other victim in this case, and it was identified as his that was taken during the robbery.

THE COURT: "His" being the other victim?

MR. GARDNER: Yes, sir. Yes, sir, Your Honor.

And as far as associating with known criminals in this—oh, and also the defendant somewhat in a way admitted the crime [126] actually to Detective Kee. He asked him how many other robberies besides the two tonight had he participated in, and then he told him there were several other more. That is direct evidence that the Court can consider admission by this defendant.

And then the association with known criminals. Mr. Rodriguez, once again not to rehash the same points, identified Mr. Graham as participating in this robbery with a firearm and he also identified Meigo Bailey as well as Kirkland Lawrence as being there.

And while hearsay alone is not enough to find a willful and substantial violation of probation, I think it is important that Detective Parrales was present when Meigo Bailey was interviewed, and Meigo Bailey implicated this defendant in the robbery and testified, I believe, that he had a firearm during the robbery, but he definitely said he was there and that he participated in the crime with Terrance Graham.

And the fact that the victim identified both Meigo Bailey and Kirkland Lawrence as [127] participating

in this crime will show a willful and substantial violation of condition five. And we think that the Court should find him in violation.

THE COURT: All right, Mr. Gregory.

MR. GREGORY: Your Honor, the only allegation which has been proven is that which has been admitted, which is the allegation of fleeing or eluding.

As to the other allegations, we submit there is insufficient evidence as to the same. Breaking it down the reasons are as follows:

The description of Mr. Graham is severely off. There is reference of him being 5'8", about 135 pounds, dark pants, dark shirt, about 25, 26 years of age, large lips, short hair, broad nose.

In actuality Mr. Graham is 17 years old 5'6", 165 pounds, had on baby blue shorts, an outfit. He does have short hair as do at least—as do the other five in the photospread. He does have large lips, as do the other five in the photospread. He does have a broad nose, as do the other five in the photospread.

[128] Also as to possession of firearms, the firearms found in the car, there has been absolutely no testimony as to when those firearms got in that car, how they were positioned in the car, no evidence, no information verifying that they were in that position and at the time that Mr. Graham left his vehicle. There is nothing showing that they were not in the trunk or otherwise placed there after the fact,

after Mr. Graham had left the scene. There is nothing there linking him to it, no fingerprints, no evidence of fingerprints even attempted. And the only person who spoke to and through his testimony had the photographs of the firearm in the car introduced could only say that when he got to the scene, they were there. He had no knowledge as to how they got there or when they got there, who placed them there, who handled them, who touched them, who had a weapon and who fled and who was apprehended from the vehicle, et cetera. There has been no support for that.

As to Mr. Rodriguez' testimony, he spoke to there being—initially on direct he said [129] there were four persons. Under cross he acknowledged that he only could say three because he didn't see a fourth.

He also said there were two automatic firearms. He knows, as I understood from the translator, he knows they are automatics because he was in the Army. In actuality they were semiautomatics. And although an evidence technician could not tell the difference, Mr. Rodriguez said he could tell what they were because of his experience. There is nothing showing that they were two automatics, absolutely no evidence that there were two automatics found in the Graham vehicle or in any other vehicle.

First, Your Honor, there has been no testimony as to who owned the vehicle. Now, regarding within the four corners of what we have here, there has been no testimony as to who had the vehicle. And since we're

only going to fleeing and eluding, there is clear evidence, Your Honor, through my client's admission, that he fled the vehicle, but there has been no evidence as to who was driving the vehicle.

[130] The only evidence, again, and he acknowledged, he admitted to, was that he was fleeing and eluding a police officer. It doesn't say when he was fleeing or eluding. He admitted to fleeing and eluding. And he has stipulated to a factual basis relating to a fleeing and eluding only. Clearly he left the vehicle, although no testimony as to which position he was within the vehicle. Clearly he fled on foot. Clearly he was apprehended. That's all part of the admission.

Also there is reference to times, but the reference to times do not corroborate or substantiate the other allegations.

And as to the Lawrence bracelet (sic), it shows that Lawrence had possession of a bracelet which was allegedly owned by Balderas. No information as to—no information substantiating or corroborating how or under what conditions Rodriguez knew that the necklace belonged to him; that . . . . . was introduced, photographs were, saying where. I submit to you that that necklace is quite indistinct. There is nothing unique about that necklace that would make it so [131] unique that you had to identify that as being the exact same one, but there was one found.

But again, that was not found in my client's possession. And because my client had a gold

necklace on, and there could be a thousand and one gold necklaces with crosses on them, the fact that he had an indistinguishable gold necklace on his person does not corroborate that he must have gotten that necklace from Balderas. There was no identification from the alleged owner, the alleged possessor of the necklace, Balderas for example, that in fact the necklace did belong to him; he recognized it, here is how I recognize it. I know it because it had a certain groove, a certain scratch, a certain scar. It had initials.

But an indistinguishable necklace, and all they can say is looking at a photograph it looks like it or is consistent with what I know Balderas had, but nothing verifying that it was in fact that necklace that Balderas had as opposed to an indistinguishable gold necklace with a cross on it that you can get at any pawnshop and any jewelry store anywhere [132] in Jacksonville or elsewhere. No proof of ownership of the same was introduced, Your Honor.

I'm looking quickly so I can conclude, Your Honor. And as to the in-court identification of my client, I submit to you that Mr. Rodriguez, although he said he had no knowledge or understanding of why he was here than just speaking because he got a citation of some sort, no other knowledge, no idea that my client would be here. Nonetheless, he did acknowledge that—at the end that the photograph shown to him assisted him identifying a person in court, refreshed his recollection and the rest, and I would submit to you that his identification is suspect.

Thank you, Your Honor.

THE COURT: Thank you. All right, we'll pass it to January 4th, the agreed upon date.

If you can have the transcript by next Wednesday.

Thank you very much.

MR. GREGORY: Thank you, Your Honor. Have a good day.

THE CLERK: Both cases?

[133] THE COURT: Yes.

MR. GREGORY: Your Honor, are you gone for the year now or will you be here next week?

THE COURT: I'm here the 22nd.

MR. GREGORY: 22nd?

THE COURT: Yes.

MR. GARDNER: Your Honor, I hate to belabor. Can I make one last point?

THE COURT: No.

MR. GARDNER: Okay.

(The proceedings were concluded at 5:43 p.m.)

– – –

[Court Certificate Omitted In Printing]

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2003-CF-011912-CFA

DIVISION: CR-C

STATE OF FLORIDA

-vs-

TERRENCE GRAHAM

Defendant.

STATE OF FLORIDA)
COUNTY OF DUVAL)

(Filed Jul. 14, 2006)

PROCEEDINGS taken before the Honorable LANCE M. DAY, Judge of the Circuit Court, Division CR-C, in the Duval County Courthouse, Jacksonville, Florida, on Friday, January 13, 2006, at 10:11 a.m., and as reported by Colleen S. David, a Notary Public in and for the State of Florida at Large and Court Reporter.

OFFICIAL REPORTERS, INC.
201 EAST ADAMS STREET
JACKSONVILLE, FL 32202
(904) 358-2090

[2] APPEARANCES:

DARIN GARDNER, Esquire,

Assistant State Attorney, appearing on behalf of the State of Florida.

RODNEY GREGORY, Esquire,

appearing on behalf of the Defendant.

[3] PROCEEDINGS

January 13, 2006 10:11 a.m.

MR. GARDNER: I have Terrence Graham, on the top and bottom of page 4, with Mr. Gregory.

MR. GREGORY: Good morning, Your Honor.

THE COURT: Good morning, how are you?

MR. GREGORY: Fine, sir.

THE COURT: Let me see the attorneys at the sidebar for just a moment.

MR. GREGORY: Yes, sir.

(A discussion was held off the record.)

THE COURT: All right. Go ahead and bring out Mr. Graham.

MR. GREGORY: Your Honor, as a housekeeping matter, if I may. I know he has more than one case, there is one case that is in a non-plea posture. I understand that other counsel had filed a—have filed various motions on Williams Rule as to their clients, and I'm going to move to adopt, I'm going to actually file something in writing on that, and see if I need to file any independent motions. I just wanted to do that as a housekeeping matter so I wouldn't forget. [4] I understand counsel has no objection to my orally adopting the motions. And again, I'll put them in writing if appropriate.

THE COURT: All right.

MR. GREGORY: Thank you.

THE COURT: All right. We're here for a ruling as to the remaining matters as to the violation—affidavit of the violation of probation, is that correct?

MR. GARDNER: Yes, sir, Your Honor.

THE COURT: All right. Is there any further arguments from either side?

MR. GARDNER: No, sir, Your Honor.

MR. GREGORY: No, sir.

THE COURT: All right. And which allegation is the State alleging that it's proven up?

MR. GARDNER: It would be violation of Condition 3 by possessing, owning, or carrying a firearm; Condition 4, the violations of the home invasion robbery, Mr. Graham, I believe, admitted to the fleeing at the hearing; and then Condition 5, associating with persons engaged in a criminal activity.

MR. GREGORY: For the record, Your Honor, [5] I believe as to Condition 4 the State did not attempt to introduce any evidence regarding the license suspension, in terms of revoking, so I think that would be what they're asking for, is that correct?

THE COURT: I can't hear you.

MR. GREGORY: I think the license charge is one that the State abandoned for purposes of the VOP hearing.

THE COURT: That was my recollection.

MR. GARDNER: That's correct, yes, sir.

THE COURT: But you are still proceeding on the violation of Condition 4 based on the evidence presented as to the home invasion robbery.

MR. GARDNER: Yes, sir.

THE COURT: And again, according to my notes it was the fleeing and attempting to elude, that was the plea by the defendant to the Court, is that right?

MR. GREGORY: Yes, sir.

THE COURT: All right. Is there anything else then, by either side?

MR. GREGORY: No, sir.

MR. GARDNER: No, sir.

[6] THE COURT: Based on the evidence presented, the Court does find a violation of probation as to the remaining conditions, specifically Condition 3, violation of Condition 3, the order of probation by possessing, carrying or owning a weapon or firearm; a violation of Condition 4 of the order of probation by failing to remain and live at liberty without violating

any new laws by committing the offense of home invasion robbery.

The Court finds that there was no evidence regarding the driver's license charge, therefore the Court does not find a violation there.

The defendant has already admitted his guilt as to fleeing and attempting to elude a law enforcement officer, aggravated chase, which was also a violation of Condition 4.

The Court finds that there is violation of Condition 5 of the order of probation by associating with persons engaged in criminal activity.

The Court does not find—there was no evidence of violation of Condition 11 of the [7] order of probation by failing to make court costs to the probation officer, therefore the Court does not find he's in violation of that condition.

So, it's Conditions 3, 4, and 5 as outlined.

MR. GREGORY: As indicated, I think, Your Honor, yes, sir.

THE COURT: Right.

MR. GREGORY: Yes, sir. Your Honor, my client just said he did not understand what the Court just said.

THE COURT: In other words, sir, I'll go back over it with you again. Certain violations, I

found you in violation of certain ones, others I did not. Do you understand that now?

THE DEFENDANT: Yes, sir. I understand what violations you found me—you said I found guilty in violation for home invasion?

THE COURT: Yes, sir. I said there was sufficient evidence for the Court to find you in violation of Condition 4 of the order of probation by failing to live and remain at liberty without violating any new laws by [8] committing the offense of home invasion robbery.

You've already admitted to the fleeing and attempting to elude a law enforcement officer, aggravated chase.

The State did not present anything on the operating a motor vehicle while driving license suspended, cancelled, or revoked. So, I didn't consider that, and found specifically that that was already abandoned by the State.

I further found that you were not in violation of condition 11, because there was no evidence presented for a violation.

The remainder of the violations, then, I've already gone over on the record, I did find you in violation of.

THE DEFENDANT: May I say something, Your Honor?

THE COURT: You can at your sentencing, yes, sir.

The remaining case, 2004, I believe?

MR. GARDNER: That's correct.

THE COURT: It is 16505?

MR. GARDNER: Yes, sir, Your Honor.

THE COURT: All right. That's still [9] pending.

Is your client entitled to a PSI?

MR. GREGORY: No—well—

MR. GARDNER: I believe so, Your Honor.

MR. GREGORY: I believe he is because of HO.

THE COURT: All right. Do you want to go ahead and order a presentence investigation?

MR. GREGORY: Yes, sir.

MR. GARDNER: Your Honor, I believe it's because he had a withhold on the underlying.

THE COURT: All right. I'll go ahead and order a presentence investigation.

Mr. Graham, the Department of Corrections is going to come over and interview you regarding the presentence investigation. If they ask you any questions that you feel uncomfortable answering,

then you need to refer them back to your attorney, do you understand that, sir?

THE DEFENDANT: Yes, sir.

THE COURT: All right, sir. How do the parties want to proceed on the remaining case, do you want to pass that until after the sentencing, or before?

[10] MR. GREGORY: I'd like to have it after the sentencing, Your Honor.

THE COURT: All right. It will take about 30 days to get the PSI completed. So, let's go ahead and set up a tentative sentencing date.

MR. GREGORY: Yes, sir.

THE COURT: Look at Tuesday, February the 14th.

MR. GREGORY: I can do it that day, Your Honor.

THE COURT: All right. How about at 1:30?

MR. GARDNER: That's fine, Your Honor.

MR. GREGORY: Yes, sir. I have a deposition, but I'll make arrangements.

THE COURT: All right. Mr. Graham, if you have any witnesses that you want to have called on your behalf, to testify on your behalf prior to the sentencing, I'll accept their testimony either in writing, or in person, or by telephone, all right, sir?

THE DEFENDANT: Talking about for my violation?

THE COURT: Right.

[11] THE DEFENDANT: I was found guilty of violation on what, four different counts?

MR. GREGORY: What the Court just told you.

THE DEFENDANT: Well, I ain't understand.

THE COURT: Okay. Well, Mr. Graham, I'm not going to go back over it with you again. The point is, if you have any witnesses that you want to have testify on your behalf, you can have them here in person, you can have them here, they can do it through writing, or they can do it through the telephone, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. The same goes for the State.

MR. GARDNER: Yes, sir.

THE COURT: All right. We'll pass it to February the 14, at 1:30.

MR. GARDNER: Your Honor, as far as the other two codefendants, they're on the 27th for the Williams Rule hearing. I'm hoping that the sentencing will take care of this particular case and

the new one. If not, I assume we can pick that back up afterwards.

[12] THE COURT: That's fine.

MR. GREGORY: Thank you, Your Honor.

(Proceedings concluded at 10:23 a.m.)

[Court Certificate Omitted In Printing]

Circuit Court, Fourth Judicial Circuit of Florida
State of Florida v. Terrance Jamar Graham

(Filed Mar. 7, 2006)

Paul DiBlasi
[Home Address Omitted]
Jacksonville Beach, Florida
32250
[Phone Number Omitted]
3/7/06

Judge Lance Day

Your Honor,

I am writing you this letter to let you know how I feel about the defendant. I was the victim of his first attempted robbery. While sitting in my office at work the defendant and two other men entered thru a back door and proceeded to strike me in the head twice with a steel bar in an attempt to incapacitate me so they could rob the business. Luckily this attempt failed leaving me with twelve staples in my head and an underlying sense of fear. I was very lucky in that a blow to the head any harder or a few inches in either direction could have left me permanently injured or dead.

I was relieved to find that the police were able to apprehend all three men as well as a fourth getaway driver. I was notified by the district attorneys office as to the outcome of their cases. All received similar sentences of about a year of jail to be followed by probation. At that time I was able to consider that these men were all around the age of 18. I figured

that this was just a stupid lark and that they hac probably learned there [sic] lesson, I honestly didn' see any reason to ruin there [sic] lives. Apparently, was wrong, the defendant obviously is mor interested in being a criminal rather than a usefu part of society. I urge you to consider that this youn man attacked me with complete disregard to my lif or well-being and has moved on to other victims. Her is our chance to lower the crime rate we all constantl hear about in Jacksonville.

Thank you for your time,

/s/ Paul DiBlasi
Paul Diblasi

Circuit Court, Fourth Judicial Circuit of Florida
State of Florida v. Terrance Jamar Graham

(Filed Mar. 7, 2006)

3/7/06

I came from Equador to U.S. on Visa and am currently still applying for residence. On the day of the crime I was scared and nervous. In Columbia I had seen people get robbed but this was different because I had a gun to my head. After this event I was afraid to leave the house and even open the door. This has caused me fear now because I am afraid that peole will hurt me or my family so I will not testify against them. This has also affected me by making me borrow money from people and causing debts that I am still paying off. All the testimonies I have done have been because I know I will have the protection of the police but I am still a little scared when I do it. If I would have done this in Columbia I or a family member would have been dead. Now since I have testified I feel more calm about it. The only time I get scared or think about what occurred is when I testify and face the suspect, because I feel fear that he will hurt me or my family.

I.E. DIAZ #61535 translated for
CARLOS RODRIGUEZ
/s/ Carlos Rodriguez

Det C.P. Crosby 3/7/06

[SEAL]

CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT OF FLORIDA

LANCE M. DAY DUVAL COUNTY COURTHOUSE
CIRCUIT JUDGE **JACKSONVILLE, FLORIDA 32202**

(Filed Mar. 7, 2006)

March 7, 2006

Darin Gardner, Esquire
Office of the State Attorney
330 E. Bay Street
Jacksonville, FL 32202

Rodney Gregory, Esquire
Attorney for Defendant
3900 Atlantic Boulevard
Jacksonville, Florida 32207

Re: State of Florida vs. Terrance Graham
Case No.: 16-2003-CF-11912-AXXX-MA

Dear Attorneys:

Please find enclosed a copy of correspondence received in my office on March 6, 2006 in regard to the above referenced Defendant for your review. The originals have been filed in the court file.

The Defendant is next scheduled for review before the Court on March 7, 2006.

Sincerely,

/s/ Lance M. Day
LANCE M. DAY

Enclosure
psy

March 1, 2006

To the Honorable Judge Lance Day

Dear Judge Day,

I hope by the time this letter reaches you that it finds you in the best of health. My name is Mary Lee Graham I am the mother of Terrence Jamar Graham. I am truly sorry that I cannot be there for my son's sentencing hearing. I am a single parent of four boys and I can not take off work anymore due to the fact that I have taken off in the past for court and the dates have always been changed to another court date.

I am writing this letter to you on behalf of myself and my sons. I have always done the very best that I could to take care of my children and raise them to the best of my ability. It was never easy trying to raise four boys alone with no help from anyone except the good Lord by my side. Terrence is the second to the oldest of my four but he has always seemed like my oldest. Terrence was the one who would make sure that everyone in the house was in order, did the house work correctly, and went to work at the carwash in the hot sun to make sure we had food or whatever it was we needed. We have always been a close family, because all we have is each other. My middle son Michael Graham has been off to two programs a lever [sic] 4 the first time and a level 6 the second time. I had to run up and down the road to be there for my son no matter what, because that is what a mother does and I never gave up on him.

I am sure you will understand when I say that I can't teach my sons how to be a man since I am not a man myself. So what I did was I got down on my knees and I prayed to God to lead me in the right direction with all of my children and he did. I left a home in Jacksonville, Fl. And moved to St. Mary's Ga. To start a 30 year mortgage just so my boys can get another chance at life better them. Most of all I wanted to get them away from their so called friends and buddies that they were hanging out with. For some unknown reason they always seem to pick the wrong crowd to hang out with. They were being followers and not leaders. Since moving to St. Mary's Michael has done a 360 degree turn around he has not been in any trouble. He attends Candem County High School, in the 10th grade. His grades are all A's and B's and a GPA of 3.75. He is the starting running back on the Varsity Football team. I know that may not seem like much but to me it is a blessing from God. He also has a part time job a [sic] McDonalds in Kingsland Ga. And has no desire to return to Jacksonville at all. He has no contact what so ever with the old crowd and is really doing great. So I really believe that this was the best move that I could have ever made and if I need to work 3 jobs to my home in Georgia then I will do just that.

I want my sons to have this second chance because all of them are very good kids and have a lot going for them. Sir whenever Terrence is released he will be joining myself and his brother in St Mary's. I will give you my word on everything that I love sir

that I will push with everything in me to make sure he completes his schooling and furthers his education. To get his life back on track and make wiser choices. When you have God on your side there is nothing that can go wrong because God does every thing for a reason and he does not make mistakes. I am a living witness to this because I raise four boys with his help. So whatever decision is made in the courtroom I know that it is all Gods will and what ever his will it shall be done, and no one or nothing can change that. I don't know what is going to happen to my son because I don't understand or know anything about the law but I do know God and I understand him so I'm going to leave this situation in his hands and either way it goes I know it's going to be alright because it is in good hands. God bless you and your family.

Mary Graham

/s/ Mary Graham

No. 08-7412

FILED
JUL 16 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writ Of Certiorari To The District Court Of Appeal, First District, State Of Florida

JOINT APPENDIX: VOLUME II OF III (Pages 212 to 435)

BRYAN S. GOWDY*
JOHN S. MILLS
REBECCA BOWEN CREED
JESSIE L. HARRELL
MILLS CREED & GOWDY, P.A.
865 May Street
Jacksonville, FL 32204
(904) 350-0075
bgowdy@appellate-firm.com

DREW S. DAYS, III
BRIAN R. MATSUI
SETH M. GALANTER
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, DC 20006

GEORGE C. HARRIS
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105

Counsel for Petitioner

BILL MCCOLLUM
Attorney General
SCOTT D. MAKAR*
Solicitor General
OFFICE OF THE ATTORNEY GENERAL OF FLORIDA
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300
scott.makar@myfloridalegal.com

Counsel for Respondent

Counsel of Record

Petition For Certiorari Filed November 20, 2008
Certiorari Granted May 4, 2009

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

VOLUME I

Relevant Docket Entries:

Circuit Court, Fourth Judicial Circuit of Florida 1

First District Court of Appeal of Florida 3

Supreme Court of Florida 5

Information, filed October 13, 2003 6

Motion for Reasonable Bond, filed November 13, 2003 9

State's Discovery Exhibit and Demand for Reciprocal Discovery, filed November 19, 2003 12

Plea of Guilty and Negotiated Sentence and Waiver of Rights and Sentencing Procedures Under § 985.233, Florida Statutes, filed December 18, 2003 17

Certification of Minor as an Adult, entered December 18, 2003 28

Transcript of Proceedings before Hon. Peter L. Dearing, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, on December 18, 2003 30

Rule 3.992(a) Criminal Punishment Code Scoresheet, filed December 18, 2003 39

Order of Probation (Certified Juvenile), entered January 7, 2004 42

TABLE OF CONTENTS – Continued

Page

Arrest and Booking Report, filed December 8, 2004 50

Affidavit of Violation of Probation, filed December 13, 2004 53

State of Florida Department of Corrections Violation Report, filed December 13, 2004 56

Admission of Violation of Probation/ Community Control and Negotiated Sentence—Form 8, filed December 16, 2005 64

Transcript of Proceedings before Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, on December 16, 2005 67

Transcript of Proceedings before Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, on January 13, 2006 195

Letter from Paul DiBlasi to Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, filed March 7, 2006 205

Letter from Carlos Rodriguez to Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, dated March 7, 2006 207

Letter to Counsel from Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, dated March 7, 2006 208

TABLE OF CONTENTS – Continued

Page

Enclosure: Letter from Mary Graham to Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, dated March 1, 2006 209

VOLUME II

Transcript of Proceedings before Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, on March 7-8 and April 7, 2006 212

Letter to Counsel from Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, dated May 17, 2006 283

Enclosure: Letter from Mary Graham to Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, dated May 14, 2006 284

Excerpt of Letter from Terrance Graham to Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, filed May 25, 2006 287

Rule 3.992(a) Criminal Punishment Code Scoresheet, filed May 25, 2006 289

Judgment of the Circuit Court, Fourth Judicial Circuit of Florida, filed May 25, 2006 292

Order of the Circuit Court, Fourth Judicial Circuit of Florida, Revoking Probation, filed May 25, 2006 305

TABLE OF CONTENTS – Continued

Page

Transcript of Proceedings before Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, on May 25, 2006 307

Uniform Commitment to Custody, entered May 30, 2006 398

Notice of Appeal, filed June 14, 2006.....401

Letter to Counsel from Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, dated July 24, 2006 402

Enclosure: Letter from Mary Graham to Hon. Lance M. Day, Circuit Judge, Circuit Court, Fourth Judicial Circuit of Florida, dated July 10, 2006 403

Opinion of the First District Court of Appeal of Florida, filed April 10, 2008.....406

Order of the First District Court of Appeal of Florida Denying Motion for Rehearing, Clarification and Certification, entered May 16, 2008 432

Order of the Supreme Court of Florida Denying Petition for Review, entered August 22, 2008.....433

Letter from the Supreme Court of the United States respecting the grant of *certiorari* and leave to proceed in forma pauperis, dated May 4, 2009 435

TABLE OF CONTENTS -- Continued

Page

VOLUME III (Under Seal)

Pre-Sentence Investigation Report, filed May 25, 2006 436

Attachment: Department of Corrections Case Management Program Mental Health Assessment Report 446

Attachment: Statement of Defendant Terrance Graham 450

The following documents have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

Defendant's Motion to Correct Sentencing Error and Illegal Sentence Pursuant to Fla. R. Crim. P. 3.800(b)(2), filed in the Circuit Court, Fourth Judicial Circuit of Florida, on January 17, 2007 ..... APP 24

Defendant's Memorandum of Law in Support of Motion to Correct Sentencing Error and Illegal Sentence Pursuant to Fla. R. Crim. P. 3.800(b)(2), filed in the Circuit Court, Fourth Judicial Circuit of Florida, on January 17, 2007 ..... APP 28

Initial Brief of Appellant Terrance Jamar Graham, filed in the First District Court of Appeal of Florida on May 22, 2007 ..... APP 57

TABLE OF CONTENTS – Continued

Page

Appellant's Motion for Rehearing, Clarification, and for Certification of a Question of Great Public Importance; filed in the First District Court of Appeal of Florida on October 29, 2007 ..... APP 95

Notice to Invoke Discretionary Jurisdiction of the Supreme Court of Florida, filed June 12, 2008 ..... APP 105

Certificate of Indigency Issued by the First District Court of Appeal of Florida, filed August 11, 2008 ..... APP 104

IN THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT, IN AND
FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16 2003 CF 11912 AXXX MA

DIVISION: CR-C

STATE OF FLORIDA

-VS-

TERRANCE JAMAR GRAHAM,

Defendant.

(Filed Jul. 25, 2006)

TESTIMONY AND PROCEEDINGS taken on **Tuesday, March 7, 2006, Wednesday, March 8, 2006, [and] Friday, April 7, 2006,** * * * before **The Honorable Lance M. Day,** Judge of the Circuit Court, Division CR-C, in the Duval County Courthouse, Jacksonville, Florida, and as reported by Jayne McCully, Court Reporter and Notary Public in and for the State of Florida at Large.

---

[2] APPEARANCES:

DARIN GARDNER, Esquire,

Appearing on behalf of the State.

RODNEY G. GREGORY, Esquire,

Appearing on behalf of Terrance Graham.

MICHELLE KALIL, Esquire,

Appearing on behalf of Kirkland Lawrence.

[3] INDEX

DEFENDANT'S WITNESSES PAGE

MARY LEE GRAHAM

Direct Examination 7

Cross-Examination 9

LANISHA GRAHAM

Direct Examination 12

TAVARIS DEANGELO GRAHAM

Direct Examination 14

TERRANCE GRAHAM'S STATEMENT 52

HARRY JONES

Direct Examination 61

Cross-Examination 63

TERRANCE GRAHAM

Direct Examination 69

* * *

STATE'S WITNESSES

VICTIM IMPACT LETTER OF PAUL DEBLASI.....17

VICTIM IMPACT LETTER OF CARLOS RODRIGUEZ.....20

DANIEL A. JOHNSON

Direct Examination 36

* * *

– – –

[4] EXHIBITS

State's
in Evidence (Terrance Graham)

No. 1 19

No. 2 21

* * *

[5] PROCEEDINGS

March 7, 2006 3:27 p.m.

(The defendant is present.)

THE COURT: Let's go ahead and call up the Terrance Graham case. Show Mr. Graham is before the Court. This is a continuation of the sentencing hearing.

Did you have any witnesses, Mr. Gregory, that you wanted to have testify?

MR. GREGORY: Yes, Your Honor, very brief.

THE COURT: All right.

MR. GREGORY: I would first call Mary Graham, his mother.

THE COURT: Mr. Graham, let me go ahead and have you take a seat, and then we'll let these witnesses come up.

Ma'am, if you will come up over here, please, by Mr. Gregory.

MR. GREGORY: While she is coming forward, Your Honor, I would advise the Court—

THE COURT: Just go on the other side. There you go.

MR. GREGORY: —as we discussed in chambers I have absolutely no problem with a bifurcation if we do testimony now and do the sentencing later because [6] of time constraints . . .

THE COURT: Ma'am, if you will raise your right hand and be sworn in by the clerk.

THE CLERK: Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth so help you God?

THE WITNESS: Yes, ma'am.

THE COURT: Thank you.

MR. GREGORY: May it please the Court?

THE COURT: And what is your full name for the record?

THE WITNESS: Mary Lee Graham.

THE COURT: Now, Ms. Graham, you sent the Court a letter, is that correct, in March?

THE WITNESS: Yes, sir, I did.

THE COURT: And both sides have received their copies?

MR. GARDNER: Yes, sir.

MR. GREGORY: Yes, sir.

THE COURT: I put the original in the court file.

MR. GREGORY: Yes, sir.

THE COURT: Proceed.

MARY LEE GRAHAM,

[7] having been produced and first duly sworn as a witness on behalf of the defendant, testified as follows:

DIRECT EXAMINATION

BY MR. GREGORY:

Q Ms. Graham, do you reaffirm that the letter which is—which has a date on page one of March 20, 2005, is your letter as signed by you on page two?

A Yes, sir.

Q Do you understand this is the sentencing part of the violation of probation proceeding . . . as you just . . . . . this case?

A Yes, sir.

Q You understand this is not the so-called new substantive case sentencing or concern; this is only on the violation of probation case we're here for today?

A Yes, sir.

Q With that in mind, what would you like the Court to know, going beyond what you already have

in the letter, which I can advise you the Court has read? You can read this word for word or go can go beyond it. I just want you to know the Court has it and you can speak to it or go beyond it if you like.

A No. Basically I feel like I have covered everything in the letter. I was just basically letting you know that the courts know that I am a single parent, [8] you know, of four boys raising on my own, and Terrance is the second eldest. And he is a very good child. You know, I never had any problems out of him. He was a straight A student attending Wolfson High School. He was also an athlete, very good athlete. I have like a shelf full of trophies, and 85 percent of them belong to Terrance from playing sports in school. And, you know, basically, like I said, my letter, you know, basically covered everything.

Q Is there anything else you want the Court to consider or be aware of? This is your only opportunity at this point, your only opportunity to speak to the Court on your son's behalf as to the sentence in this violation of probation proceeding.

A No, sir.

Q And for the record, what type of sentence are you asking the Court to impose for your son, below the guidelines? The guidelines are 48 months according to the PSI report. The guidelines—

THE COURT: Hold on. What are the guidelines?

MR. GARDNER: 60 months, Your Honor.

MR. GREGORY: I was going to speak to that first.

Q The guidelines are 48 months as stated in the PSI report. The guidelines are 60 months as the [9] prosecutor has in his presentence investigation—his guidelines that he is going to speak to. What is it that you're asking the Court to impose?

A I'm asking the Court to sentence my son under the guidelines because we have since moved to St. Mary's, Georgia, and I have a great home established down there now. And I would love for Terrance to be joining along with me and his brothers at this time in St. Mary's, Georgia.

Q When you say under the guidelines, what you are saying, a month, two months probation? What are you saying, if you want to be more exact?

A Well, if he can get his probation reinstated, that is what I'm really asking for and have it moved to St. Mary's, Georgia, where we'll be residing.

MR. GREGORY: I have no other questions unless you have anything else you wanted to add?

THE COURT: Any cross?

MR. GARDNER: Just briefly, Your Honor.

CROSS-EXAMINATION

BY MR. GARDNER:

Q Ma'am, you said that Mr. Graham was a straight A student?

A Yes.

Q Is that after he got out of the jail and while [10] he was on probation?

A Well, this was before.

MR. GARDNER: I don't have any other questions. Your Honor.

THE COURT: What do you think happened to your son? What got him off the path?

THE WITNESS: Hanging with the wrong crowd. I honestly believe that was the problem because, as I stated in my letter, my son Michael, where we was living at they get tied up running with the wrong crowd, and I made that move and that decision to move to St. Mary's, Georgia, and Michael is doing a 360 degree turnaround down there, Your Honor. I haven't had any problems whatsoever with Michael getting in any trouble with the law. Michael is going to school attending Camden County High School at this time. He also is a starting running back for the varsity football team, which he's only in the tenth grade.

So I really feel like it's the crowd that they, you know, hang with, so-called buddies. So after making

that move, I don't have any problems with Michael at all.

And Terrance is the onlyest one that is left down here because myself and my other three are up [11] in St. Mary's, Georgia.

THE COURT: Anything else for Ms. Graham?

MR. GARDNER: I don't believe so, Your Honor.

MR. GREGORY: Nothing from me, Your Honor.

THE COURT: Ms. Graham, thank you for taking time to come down here. I know that this is a difficult situation for you.

THE WITNESS: Yes, sir.

THE COURT: I can't think of too many things more difficult than seeing a son shackled and chained on the verge of going to prison. It sounds like you have tried to do what you can to keep him on the straight path.

THE WITNESS: Yes, sir.

THE COURT: It sounds like you have done your job.

THE WITNESS: Thank you.

THE COURT: And unfortunately he didn't listen to you.

THE WITNESS: Yes, sir.

THE COURT: And that is why he is here.

THE WITNESS: Yes, sir.

THE COURT: I haven't made up my mind yet, but he has put himself in a pretty bad situation as I'm sure you know.

[12] THE WITNESS: Yet, sir.

THE COURT: But don't walk out of here thinking that you somehow created all of this because you haven't.

THE WITNESS: Yes, sir.

THE COURT: All right.

THE WITNESS: Thank you.

THE COURT: I appreciate you taking the time to come down.

THE WITNESS: Thank you, sir.

THE COURT: Call you[r] next witness.

MR. GREGORY: Lanisha Graham. She is an aunt of Mr. Graham. Please come forward to be sworn.

THE COURT: Ms. Graham, if you will raise your right hand to be sworn.

THE CLERK: Do you solemnly swear or affirm that the testimony you are about to give will

be the truth, the whole truth, and nothing but the truth so help you God?

THE WITNESS: Yes, ma'am.

LANISHA GRAHAM,

having been produced and first duly sworn as a witness on behalf of the defendant, testified as follows:

DIRECT EXAMINATION

BY MR. GREGORY:

[13] Q Keep your voice up, please. Please state your name for the record and your relationship to Terrance Graham, the defendant in this cause.

A Hi, Your Honor. My name is Lanisha Graham. I'm the aunt of Terrance Graham. And I would like to say today I took off work. I know that my sister has been having a hard time trying to raise four boys on her own, and I have been of help to her the most part of Terrance's life. And I can say that he is a good child. And, you know, whenever I called he's there. He is very respectable. And I know we do, you know, teach our children to do right and to make the right decisions in life, but they all have a point in life where they want to experience things on their own, and they think they know what is best for them and they make mistakes.

So I just ask that you today, you know, to be lenient and merciful under the courts with this decision for his sentencing today.

THE COURT: All right.

MR. GREGORY: No other questions, Your Honor.

THE COURT: Any cross-examination?

MR. GARDNER: No, sir.

THE COURT: All right, ma'am. Thank you very much for taking the time to come down.

MR. GREGORY: Tavaris Graham, one of his [14] brothers, and he is the last witness other than Mr. Graham himself.

THE COURT: All right.

MR. GREGORY: He can be deferred to a later time as well.

THE COURT: That is up to you.

Sir, if you will raise your right hand to be sworn.

THE CLERK: Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth so help you God?

THE WITNESS: I do.

THE CLERK: Thank you.

TAVARIS DEANGELO GRAHAM,

having been produced and first duly sworn as a witness on behalf of the defendant, testified as follows:

DIRECT EXAMINATION

BY MR. GREGORY:

Q Please state your name for the record and your relationship to Terrance Graham.

A Tavaris Deangelo Graham, his brother.

Q I understand you had something written in front of you that you wanted to read to the Court?

A Yes, sir.

[15] Q You may do so at this time, sir.

A I'm the oldest of my mother's four kids, so I have to play the father and the big brother role. I'm always trying to keep on him, but I can't because I've been raising my own two kids. I just want to raise them the right way just like my mother raised us.

I tried to teach Terrance to be a leader and not a follower. I write him now and talk to him on the phone and tell him to pray every night because everyone makes a mistake.

Q And how old are you, sir?

A Twenty-one.

Q And how old are your other brothers?

A Seventeen, eighteen, and nine.

Q Is there anything else you want to say to the Court at this time for sentencing? And you heard what we discussed with your mother present. Is there anything else you wanted to tell the Court about a sentence of your brother on his violation of probation case?

A Yes. Just to ask can he get reinstated.

Q Are you asking for the probation to be reinstated?

A Yes, sir.

Q Is there anything else you want to say to the Court at this time, this being your last opportunity on [16] this VOP case?

A Yes, sir. Can he get time served and reinstated.

MR. GREGORY: No other questions, Your Honor.

THE COURT: Any cross-examination?

MR. GARDNER: No, sir.

THE COURT: All right. Thank you for taking the time to come down.

(Witness excused.)

THE COURT: Any other witnesses for the defense?

MR. GREGORY: No, Your Honor, other than the defendant who can await the final sentencing.

THE COURT: Does Mr. Graham want to address the Court now?

MR. GREGORY: If I can just have a moment, Your Honor.

THE COURT: Sure.

(Mr. Gregory confers with the defendant.)

THE COURT: And while we are waiting, does the state have any witnesses that you are going to call?

MR. GARDNER: No, sir. Your Honor. I do have two letters.

MR. GREGORY: Your Honor, I spoke to Mr. Graham. He said that he would not have a [17] problem with waiting. Your Honor, we prefer to have the window of an opportunity as to the other case. So I would defer so that we can do that last part at a later time so we can do the other case now that we have a window of opportunity.

THE COURT: So he doesn't want to testify is what you are telling me at this point?

MR. GREGORY: At this time. He would rather testify—

THE COURT: So you want to do it on another day?

MR. GREGORY: Yes, sir.

THE COURT: Does the state have any witnesses that you want to call?

MR. GARDNER: No, Your Honor. I just have two victim impact letters that I would like to read into the record.

THE COURT: Go ahead.

MR. GARDNER: The first letter is from Paul Deblasi. He was the victim in the underlying case that the probation was on for the armed burglary and the attempted armed robbery.

It says, "Your Honor, I am writing this letter to you to let you know how I feel about the defendant. I was the victim of his first attempted [18] robbery. While sitting in my office at work the defendant and two other men entered through a back door and proceeded to strike me in the head twice with a steel bar in an attempt to incapacitate me so they could rob the business.

"Luckily this attempt failed leaving me with 12 staples in my head and an underlying sense of fear. I was very lucky in that a blow to the head any harder or a few inches in either direction could have left me permanently injured or dead.

"I was relieved to find that the police were able to apprehend all three men as well as a fourth getaway driver. I was notified by the district attorney's office as to the outcome of their cases. All received similar sentences of about a year in jail to be followed by probation.

"At that time I was able to consider that these men were all around the age of 18. I figured that this was just us a stupid lark and that they had probably learned their lessons. I honestly didn't see any reason to ruin their lives. Apparently, I was wrong. The defendant is obviously more interested in being a criminal rather than a useful part of society.

"I urge you to consider that this young man [19] attacked me with complete disregard to my life or well-being and has moved on to other victims. Here is our chance to lower the crime rate we all constantly hear about in Jacksonville.

"Thank you for time, Paul Deblasi."

And, Your Honor, I'd like to submit this as State's Exhibit 1 for part of the sentencing hearing.

THE COURT: All right, any objections?

MR. GREGORY: I'd rather cross-examine the person, but I understand under the law a victim impact statement can come in by way of a letter. Therefore, I have no objection on that ground.

THE COURT: But you understand if you wanted to have him down here you could also subpoena him yourself if you want?

MR. GREGORY: I understand that also, Your Honor.

THE COURT: That will be received as part of the victim impact statements.

(State's Exhibit No. 1 was received in evidence.)

MR. GARDNER: And lastly, I just have a brief letter from Mr. Rodriguez.

THE COURT: Go ahead.

[20] MR. GARDNER: It says, "Your Honor, I came from Ecuador to the United States on a visa and currently still applying for residence. On the day of the crime I was scared and nervous. In Columbia I had seen people get robbed but this was different because I had a gun to my head.

"After this event I was afraid to leave the house and even open the door. This has caused—

THE COURT: Pull that mic just a little bit closer to you if you would.

MR. GARDNER: I'm sorry.

"This has caused me fear now because I am afraid that people will hurt me or my family, so I will not testify against them. This has also affected me by

making me borrow money from people and causing debts that I am still paying off.

"All of the testimonies I have done have been because I know I will have the protection of the police, but I am still a little scared when I do it. If I would have done this in Columbia, I or a family member would have been dead.

"Now, since I have testified, I feel more calm about it. The only time I get scared or think about what occurred is when I testify and face the suspect because I feel fear that he will hurt me or my [21] family."

Signed, "Carlos Rodriguez."

It was interpreted by Officer Diaz.

THE COURT: And you want to go ahead and enter that as a victim impact statement?

MR. GARDNER: As No. 2, yes, sir.

THE COURT: Is that agreeable to the defense?

MR. GREGORY: The same concern of the defense as to the other witness, the same acknowledgment as to my ability to . . . . . down here. No other statement from me at this time as to that.

THE COURT: Th[e]n I will receive it as a victim impact statement.

(State's Exhibit No. 2 was received in evidence.)

THE COURT: All right, any other witnesses for the state?

MR. GARDNER: No, Your Honor. The only other thing I had—I think I provided it to you yesterday—was a letter that the defendant wrote in his probation case before he was sentenced back in December of 2003.

THE COURT: Is that attached to the PSI?

MR. GARDNER: No, sir, Your Honor. There was one I found in our file that was written by [22] Mr. Graham. I'm not sure what the exact date was, but I know it was around the time that he was sentenced for the underlying probation case.

THE COURT: All right.

MR. GARDNER: I provided a copy to the judicial assistant yesterday. There should be a packet there for you. If not, I can make another copy and provide it to the Court.

THE COURT: Did you provide a copy to the defense?

MR. GARDNER: Yes, sir, I did.

THE COURT: Because I know the PSI has a letter from—I believe it's Mr. Graham; is that right?

MR. GREGORY: I think that is a current letter, Your Honor.

THE COURT: So we are talking about a different letter?

MR. GARDNER: Yes. This was written before he was sentenced on the armed burglary and the attempted armed robbery back in 2003.

THE COURT: Well, since we are passing the sentencing to a different date if you want to send that back, just make sure—just forward another copy to me.

MR. GARDNER: Yes, sir.

[23] THE COURT: Look at your calendars and see what is a good day to pass this to.

MR. GREGORY: Your Honor, did you want to by way of a suggestion, not a challenge, did you want us to see if there is going to be a three-week delay first?

THE COURT: Why don't I give you a date, say, Friday if that is agreeable with both sides.

MR. GREGORY: I'm going to be out of town Friday, sir.

THE COURT: How about tomorrow?

MR. GREGORY: I can come back tomorrow to just see where we are in terms of scheduling.

THE COURT: Right, with the understanding that if I need to, I'll have to bump this up when I get back.

MR. GREGORY: My only concern, Your Honor, is because I have been advised by his mother that I need to make certain, I tell her everything about dates and times. I don't know if she can come . . . . . because she is missing work. That is my only reservation about that.

THE COURT: Well, the only thing that is going to happen tomorrow is we're going to set a date.

MR. GREGORY: Okay.

[24] THE COURT: It's either going to be within the next three weeks or it is going to be after that.

MR. GREGORY: That is fine. I can come by tomorrow. Let me tell his mother she does not need to be here for that occasion.

She is nodding affirmatively she understands she does not have to be here tomorrow.

THE COURT: Ms. Graham, there is not going to be a sentencing tomorrow. This is just to schedule a date. That is all.

THE MOTHER: Okay.

MR. GREGORY: I appreciate the Court's indulgence. There was some confusion about that before so I'm bringing it up now.

THE COURT: All right.

MR. GREGORY: Thank you, sir.

THE COURT: It's going to show on the calendar—it will keep showing as a sentencing, but with that understanding we will pass it until tomorrow.

MR. GREGORY: Yes, sir. Thank you, sir.

THE COURT: Mr. Graham, if you will step back in the back.

THE CLERK: Do you want the other case to follow as well, Your Honor?

THE COURT: Yes.

[25] (The proceedings were concluded.)

– – –

March 8, 2006 10:45 a.m.

MR. GREGORY: I'm here with Darin Gardner on Terrance Graham. Your Honor was just going to give us a pass date. Excuse me.

THE COURT: Which case?

MR. GREGORY: Terrence Graham. This was passed from yesterday evening.

(The defendant is present.)

MR. GREGORY: Mr. Graham is coming to stand to my left. Yesterday Your Honor advised that this would not be the sentence day; that you, however, thought you can give us perhaps a control day for sentencing depending upon what happens to the other case, which currently is going to trial.

THE COURT: We can use the same date if you like.

MR. GREGORY: That is fine, Your Honor.

THE COURT: March 22nd.

MR. GREGORY: Yes, sir.

THE COURT: Is that agreeable with the state?

MR. GARDNER: I believe so. That afternoon or during the calendar?

THE COURT: It is hard to tell. We will try [26] for the calendar, but it depends on what—

MR. GREGORY: I'll come that morning. Well—

THE COURT: I would contact us before that day.

MR. GREGORY: Yes, sir.

MR. GARDNER: I'm wide open.

THE COURT: Pass it to March 22nd.

MR. GREGORY: Thank you, Your Honor.

(Concluded at 10:47 a.m.)

— — —

April 7, 2006 2:00 p.m.

THE COURT: Go ahead and bring out Mr. Graham.

(The defendant is present.)

MR. GREGORY: He is here, sir.

THE COURT: We are here for sentencing in Case No. 011912. Is there anything else that either side wishes to present?

MR. GREGORY: Yes, sir.

MR. GARDNER: Yes, sir, Your Honor.

Your Honor, I provided a letter to defense counsel. I think the Court has been provided a copy.

THE COURT: The letter that you sent to him regarding—

MR. GARDNER: Brandon Johnson.

I actually have several witnesses here today in [27] this particular case that I would like to put on to show some of the differences between the two.

THE COURT: In terms of the case before the court, the probation case, what are the guidelines again, and which count was he on probation for again?

MR. GARDNER: I believe it was counts 1, 2, and 3, Your Honor.

THE COURT: I'm not showing count 3.

MR. GARDNER: Correct. That is right, count 1 armed burglary with assault or battery, which is a first punishable by up to life and then the attempted armed robbery with a weapon, which is a second-degree felony.

I actually have the guidelines prepared. I just haven't filled out the sentence portion. Would the Court like to look at it?

THE COURT: All right.

MR. GREGORY: Your Honor, before Mr. Gardner—may it please the Court?

THE COURT: Yes.

MR. GREGORY: Before Mr. Gardner proceeds, we object to him calling witnesses in the other case to try to show differences. One, I had no information, no knowledge, no communication with Mr. Gardner, [28] although we have spoken on several occasions. Now this week, last week and last—relative to his calling any witnesses, his letter to me referred to the judgment and sentence, and I was prepared to speak in terms of the final stages of this argument as to the sentencing referring to the matters of record and it puts me at a disadvantage now him calling three or four witnesses as to another case. I have no discovery or other people. I haven't attempted to call anyone else, Your Honor, no one.

To call Brandon Johnson or anybody else, call other people, now I'll be in cross-examination mode as to matters which I have not discovered, no . . .

. . . to ask proper questions. I am limited by whatever the scope of the direct-examination is. It is unfair to Mr. Graham.

Now we have had this case passed, passed because, Your Honor, the trial on the last few occasions and other reasons. But since this has never come up before, I think it is a bit unfair to Mr. Graham and to me on Mr. Graham's behalf for me to now be in a position to hear what other witnesses may say as to Brandon Johnson, which are now matters of the court file, the clerk's file record to do so today in particular—

[29] THE COURT: What I'm trying to figure out is he was placed on probation. Why am I revisiting the facts of why he is placed on probation?

MR. GARDNER: No. This is in reference to the violations.

THE COURT: So known matters that the Court has found him in violation of?

MR. GARDNER: Correct. Yes, sir. I think it is important for the Court to hear the actual facts of fleeing in aggravation. That is why I had Sergeant Johnson here today. And then the victim is here. I know he wrote a letter to the Court.

I realize we are going back through the discovery of the case—that he indicated that Mr. Graham was in fact the leader of the group. There were several facts he would bring out that was some aggravation.

MR. GREGORY: This was the victim of the violation, the robbery. Mr. Rodriguez.

THE COURT: Of the home—

MR. GARDNER: Yes, sir, and that was the only two things that I had.

THE COURT: Okay.

MR. GARDNER: It should be fairly brief.

MR. GREGORY: May I be heard as to those two [30] things, Your Honor?

THE COURT: Yes.

MR. GREGORY: Your Honor, Mr. Gardner expressly asked the Court for leave to reopen the testimony to re-call a witness at the conclusion of testimony prior to—of the VOP proceeding. Your Honor denied that request. All of the evidence was in. That was it.

THE COURT: Yes, but that is for the Court to make a determination if your client was in violation. This is now at sentencing. Why would I hinder myself from knowing all of the information about the facts and circumstances for sentencing to understand what the proper sentence should be?

MR. GREGORY: The fleeing and eluding, Your Honor, my client admitted already. You found that already. It is just a matter of sentence. Now what counsel wants to do now is to try to reopen that part of the case as to the violation.

THE COURT: Not reopen it. He wants to make sure that the Court—it sounds like he wants to make sure the Court understands what the fleeing was—

MR. GREGORY: I think, Your Honor—well, of course, obviously I'll defer to the Court. I think [31] we have already established that point. We have already had extensive testimony as to the fleeing. There is nothing new about that. We have already heard as to the victim, Your Honor, the alleged victim that he wants to re-call. He has already been on the stand. He has already been thoroughly examined and expressed his views. I don't see any reason to rehash, go over and reiterate what has already been put on the record.

THE COURT: I'm going to allow the victim's testimony. He has taken the time to come down here today. I will allow it. But if you need some additional time after their testimony to prepare, you will certainly have it.

MR. GREGORY: Yes, sir.

THE COURT: All right, call your first witness.

MR. GARDNER: Mr. Rodriguez, Carlos Rodriguez.

And, Your Honor, the interpreter is present. Do you want him on the witness stand? It is probably easiest.

THE COURT: If the interpreter would give his name for the record.

THE INTERPRETER: My name is Carlos Cordez.

THE COURT: And you are a certified interpreter; is that correct?

[32] THE INTERPRETER: No certification. I have experience.

THE COURT: Are you certified through the court administrator's office?

THE INTERPRETER: I took the written test and passed it. I have not taken the oral test.

MR. GREGORY: I would object, Your Honor.

THE COURT: Are you recognized through court administration as a qualified interpreter?

THE INTERPRETER: I'm afraid I don't know what you mean. There is a certain recognition by the court? No. In that case no.

THE COURT: I'm sorry. Then we can't use you.

MR. GARDNER: Your Honor, the only thing I can think to do is proceed with Sergeant Johnson and then maybe see if I can get somebody down here.

THE COURT: Sure. That is fine.

MR. GARDNER: May I have a moment and just call upstairs? Can I use the clerk's phone?

THE COURT: Sure.

THE INTERPRETER: Am I dismissed?

THE COURT: You are excused. Thank you very much. You might check with court administration. If you are not on their approved list, then I can't use you for future hearings.

[33] THE INTERPRETER: I understand. Where is court administration?

THE COURT: Down at the end of the hallway over on the second floor, where the elevators are, on the other side of the elevators to the left.

THE INTERPRETER: Okay. Can you initial on the bottom my arrival and departure times. The agency that hired me requires that.

THE COURT: And who is that?

THE INTERPRETER: International Language Services.

THE COURT: Is that Ms. Matos?

THE INTERPRETER: Yes, exactly.

THE COURT: What time did you arrive?

THE INTERPRETER: A quarter to 2:00.

THE COURT: There you go, Madam Clerk.

THE INTERPRETER: Thank you, sir.

THE COURT: Why don't you go down, since he has taken the time to come down, to the court administrator's office and make sure there is no misunderstanding about this.

MR. GARDNER: Do you know where?

THE COURT: Mr. Levant, take him down to the court administrator's office if you would.

We will go back into recess.

[34] (Discussion off record and recess.)

THE COURT: Show the defendant is present with his attorney, as is the state.

MR. GARDNER: I spoke with Deborah in court administration. She informed me that there is no requirement that the interpreters for the court be actually certified through the State of Florida. They say that the court administration has a list of agencies that they use that they have contracts with and then the agencies go out seek out the actual interpreters. The only certified interpreter we have in this jurisdiction is Ms. Matos and another gentleman who travels between here and New Jersey.

THE COURT: How do I determine that they can properly interpret then?

MR. GARDNER: I'm not sure. I guess through using them in the court in the past. She said

there is another young lady Adrienne in J1 she can try to get here if necessary.

THE COURT: Since I don't speak Spanish, I wouldn't know if he was properly interpreting. That is why I rely on the court administrator's office to make sure that they bring in qualified people.

Sir, I'm not suggesting that you are not. There is just no way I have any way of knowing—

[35] THE INTERPRETER: I can describe my experience to you if you would like.

THE COURT: You could tell me everything. It wouldn't matter because there is no way that I would know, and I'm sure you are, and it is probably just a glitch that we have to work out. We contract with Ms. Matos because I know she is certified. She comes into court and has been certified on prior occasions, and I have no problem with her, but she is evidently subcontracting down now, which may be fine, but it is just something we'll have to deal with.

MR. GARDNER: This is the first time I have ever run into this.

THE COURT: I understand.

So where is this other person?

MR. GARDNER: She was in J1. They were going to call and make sure she is coming. They are going to get her right now.

THE COURT: It is probably something you ought to discuss with Ms. Matos though in the future.

MR. GARDNER: Absolutely.

THE COURT: So we can let this gentleman go. Thank you very much, sir. You might check with Ms. Matos.

[36] THE INTERPRETER: I will. Oh, believe me. Yes, sir.

THE COURT: Thank you for your time.

THE INTERPRETER: Sure.

MR. GARDNER: The state calls Sergeant Johnson, Daniel Johnson.

THE COURT: Sergeant Johnson, please. If you'll come down to this area where the bailiff is standing and then if you will face me and place your left hand on the Bible and raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give in this cause will be the truth, the whole truth, and nothing but the truth so help you God?

THE WITNESS: I do.

THE COURT: Have a seat and we will adjust that mic for you.

Proceed, Counsel.

DANIEL A. JOHNSON,

having been produced and first duly sworn as a witness on behalf of the state, testified as follows:

DIRECT EXAMINATION

BY MR. GARDNER:

Q Can you tell us your name, please.

A Daniel A. Johnson.

[37] Q Where are you employed?

A Jacksonville Sheriff's Office.

Q And what is your capacity with the Sheriff's Office right now?

A A sergeant in the detective division.

Q Back on December 2nd, 2004, what was your position then?

A I was a sergeant in patrol.

Q Which zone?

A Zone 3.

Q And which shift do you normally work on the midnight shift?

A At approximately sometimes shortly after 9:00.

Q Did you receive a call for assistance at Memorial Hospital?

A I did. An off-duty unit was calling for assistance. He had a victim of a shooting and that he was trying to effect a stop of a vehicle.

MR. GREGORY: Object to hearsay.

THE COURT: Overruled.

A He was attempting to effect a stop of the vehicle that had—I was assuming that contained the victim of the shooting. I don't know if it was a suspect or if it was somebody dropping off. That information wasn't given other than it was a black vehicle fleeing [38] the parking lot of Memorial Hospital.

Q Did you proceed to Memorial?

A I was in the right place at the right time, if you will, northbound on University when that dispatch went out. I was actually approaching the hospital, and I observed the black vehicle exit the parking lot of the hospital at a high rate of speed with a disregard for traffic. In fact my car and a vehicle in the lane adjacent to me had put on her brakes firmly, abruptly just to avoid being in a crash.

Q So what did you do at that point?

A At that point I left the vehicle since I was in the outside lane, and the vehicle on the inside lane passed me. I made a U-turn and got behind the black vehicle and we proceeded southbound on University. I had to make a U-turn.

Q Did you activate your emergency equipment?

A I did.

Q What about sirens?

A I did.

Q Did you proceed to follow the car?

A Yes, I did. We headed southbound on University Boulevard. He made a right-hand turn onto Kennerly Road. At that time it was apparent that he wasn't going to stop even though I had on my blue lights and sirens. He [39] pulled into an office parking lot. I thought he was going to stop at that point but he continued through the parking lot back out to Kennerly westbound towards Spring Park.

Q Do you know how fast the vehicle was getting?

A On Kennerly?

Q Yes, sir.

A On Kennerly exceeding probably 50 to 60 miles an hour.

Q What happened when you got to Spring Park?

A When he hit Spring Park he made a right-hand turn onto Spring Park without stopping. There was a stop sign right there and he headed northbound on Spring Park Road where he really started accelerating to higher speeds. I think we reached

better than 90 miles an hour and headed northbound on Spring Park towards Emerson.

Q This is a two-lane road, correct?

A It is a two-lane road.

Q Is it residential?

A Primarily residential.

Q And what happened when you got to Emerson?

A Well, that intersection there is actually Beach Boulevard, Spring Park, and Emerson. He made a U-turn to go westbound on Emerson, and so I stayed with him at the time, and we went down Emerson until we [40] approached Ring Lane, once again making that U-turn onto Emerson. He ran a stop sign there, got in Ring Lane, attempted to make a left-hand turn onto Ring Lane, and he failed to negotiate that turn and struck a telephone pole.

Q What did the driver do at that point?

A The driver fled from the vehicle across Ring Lane into a wooded area behind some houses. He went up to the next block. I'm not familiar with the name of the roads. It is Parnell and Emerson, the first block on Ring Lane, and I followed him as he was running through the wood of the backyards. I followed him down that street. He stopped when he reached the end of the house, so I backed up and then we kind of played cat and mouse until backup arrived. I believe it was officer—

Q That arrived?

A That's correct.

Q Did you eventually apprehend the defendant?

A I did.

Q Now, during the course of the chase was there any other traffic that was affected?

A On University the traffic was moderate.

MR. GARDNER: I don't have any other questions, Your Honor.

THE COURT: Any cross?

[41] MR. GREGORY: No, sir.

THE COURT: All right. Thank you very much, sir.

(Witness excused.)

THE COURT: We are going into recess until the interpreter comes up, or do you have something else to present?

MR. GARDNER: Your Honor, I just had some letters that the defendant wrote in the probation case that I thought the Court might like to see.

THE COURT: Why don't you go ahead and review that with Mr. Gregory.

MR. GARDNER: I provided it to him last night.

MR. GREGORY: I think it has already been shown the Court, already been discussed.

THE COURT: Well, I wouldn't know until I looked at it.

MR. GARDNER: Here is a copy for the Court.

(The Court reviews the document.)

THE COURT: Actually, I have already read it.

MR. GARDNER: Oh, you did.

THE COURT: Yes. It is in the packet.

MR. GARDNER: Okay.

THE COURT: It is actually a part of the court file.

[42] MR. GARDNER: That is all I have to offer.

THE COURT: All right.

MR. GARDNER: May I be excused for one moment, Your Honor?

THE COURT: All right.

MR. GARDNER: She isn't available until 4:00. I have a deposition I have to attend at 3:50, so we'll just proceed forward.

THE COURT: All right.

MR. GREGORY: It is my understanding, Your Honor, the state is finished presenting whatever they want to present.

THE COURT: There is a letter from Mr. Rodriguez in the court file?

MR. GARDNER: That's correct. I read it into the record, Your Honor, the last time.

THE COURT: I have that. And that is from the victim?

MR. GARDNER: Yes, sir. He is present in court today.

THE COURT: I understand. You don't want to wait for the interpreter?

MR. GARDNER: I have a shooting victim that I have been working a lot with who is being deposed at 3:50. I have to be there for him.

[43] THE COURT: That it your choice.

All right, any witnesses for the defense?

MR. GREGORY: Your Honor, I want to know—

THE COURT: And does Mr. Graham wish to address the Court any further?

MR. GREGORY: He does, Your Honor, but before he does I want to discuss the Brandon Graham situation—the Brandon Johnson situation.

THE COURT: The victim doesn't want to stay I take it?

MR. GARDNER: He has to go back to work.

THE COURT: All right, go ahead.

MR. GREGORY: Your Honor, I am in receipt of a letter as you have already referred to as being received March 2, 2006, for the state, referring to Brandon Johnson I submit—I understand that he was sentenced by Your Honor to a three year term, and he had a violation of probation charge which was—

THE COURT: I believe that was pursuant to a negotiated plea.

MR. GARDNER: That's correct, Your Honor. He actually pled no contest.

THE COURT: All right.

MR. GREGORY: Yes, sir.

[44] THE COURT: And then I believe today Mr.—

MR. GREGORY: Kirkland.

THE COURT: —also pled to a sentencing range.

MR. GREGORY: Of 10 to 15 years with a 10 year minimum mandatory on the bottom, yes, sir. This afternoon as well, sir. Yes, sir. Thank you for stating it for the record, however.

And, Your Honor, pretty much during the—Brandon Johnson had a prior VOP. I understand he actually pled to—he was arrested—he was in juvenile court and certified as an adult. He had a battery in a detention facility charge. He had other charges. There had been a warrant out for him. His probation was for an armed burglary charge with battery, count 1, attempted armed robbery and got a three-year sentence. I understand this was by a negotiation. I'm advising the Court what has already been stated for the record by way of counsel's letter, something that the state—I believe the same prosecutor, Mr. Gardner, negotiated with Mr. Eler on a similarly situated individual.

THE COURT: How is that?

MR. GREGORY: Your Honor, the violation of probation, the nature of the VOP, the seriousness of the VOP. He received a negotiated sentence of three [45] years.

THE COURT: Well. Just so we are clear on the record, the allegations in the VOP for Mr. Graham were the same as the allegations for Mr.—what is the other gentleman's name?

MR. GARDNER: Brandon Johnson. He has an armed robbery and was a principal in the aggravated battery. There was a home invasion robbery, aggravated felony fleeing.

THE COURT: So the other gentleman was not a codefendant in the case?

MR. GARDNER: No, sir, not in the new case. The charges that were proved up during the violation of probation, correct. No, he was not. They are completely different cases. He was a codefendant in the VOP case that Mr. Graham had.

THE COURT: The original case?

MR. GREGORY: Yes, sir. And the victim in the original underlying case wrote a letter basically saying that Mr. Graham having broken the law again in his opinion should receive the maximum sentence. I do not know if he did a letter against Mr. Johnson now in terms of it being similarly situated. They were both in the underlying violation of probation, the violation of probation he had here before you—

[46] THE COURT: But not the same allegations of the VOP?

MR. GREGORY: Not the exact same charges in the violation of probation.

THE COURT: According to the state it is not related in any way; is that correct?

MR. GARDNER: No. No, sir. Mr. Johnson's case involved an African America[n] male robbed at a gas station. The charges, the allegations of the VOP in this case is home invasion robbery involving the Spanish victim Mr. Rodriguez. As far as I know the victim in that case and Mr. Rodriguez have never met each other, and there was no involvement between Mr. Johnson—Mr. Graham's and Mr. Rodriguez' case at all.

THE COURT: All right.

MR. GREGORY: May I proceed?

THE COURT: What about—is there any relationship between Mr. Kirkland, the gentleman that pled today?

MR. GARDNER: And Mr. Johnson?

THE COURT: And Mr. Graham.

MR. GARDNER: Yes. They were codefendants. Yes, sir.

THE COURT: So the allegations—so the cap [47] that—

Is it Lawrence Kirkland?

MR. GARDNER: Kirkland Lawrence.

THE COURT: All right. So his plea today is on a factual basis regarding the—

MR. GARDNER: Home invasion robbery.

THE COURT: Which is the subject of the violation of probation in this case?

MR. GARDNER: Correct. Yes, sir.

THE COURT: All right.

MR. GREGORY: May I proceed?

THE COURT: Sure.

MR. GREGORY: Your Honor, I think we're going down a slippery slope. I don't know where exactly the state is going. It is a pretty dangerous slope when I think of the differences between the two cases and start off with the . . . . . African America[n] versus Mexican home invasion.

THE COURT: Counsel, I think he was trying to make sure I understood who the players were, who is the victim and who—

MR. GREGORY: I understand, Your Honor. Just the race references is a matter of concern. I'm just raising it for the record.

I would point out, Your Honor, that [48] Mr. Johnson, as I understand it, pled guilty to armed robbery.

THE COURT: Again, I can't—really I'm surprised that you just said that. I don't see any racial inferences in the case at all [ex]cept for what you are now injecting into it.

MR. GREGORY: May I respond, Your Honor?

THE COURT: Sure.

MR. GREGORY: I believe I'm only commenting on what I heard the state say. When asked the differences, he stated the African American robbed at a gas station and what we're dealing with over here, he says the person in the home invasion was Mexican. I don't know think there is any need to

raise race at all. It is a home invasion involving one person and an armed robbery involving another. But the state said African American robbed at a gas station. The state said a Mexican who was robbed in a home invasion and refers to it for what it's worth, no more, no less, but some reason he is referring to it. The state expressly referred to race. I don't think he needs to reference that at all.

THE COURT: I don't think race is even a part of this case.

[49] MR. GREGORY: I agree. I was only concerned because the state referred to it. I will move on, Your Honor.

THE COURT: That is up to counsel. You can put anything in the record you want.

We are going to take a five minute recess.

MR. GREGORY: Yes, sir.

(Discussion off record and recess.)

THE COURT: All right, continue Mr. Gregory.

MR. GREGORY: Your Honor, my point is Mr. Johnson pled guilty to the armed robbery charge, a very serious felony offense, and that was the basis for the violation of probation in the instant case. You have a gentleman who admitted to a fleeing, and the Court found him to be in violation based on the allegations of a charge that a jury has not found him

guilty of but based on the allegations the Court properly considered to make its decision on.

THE COURT: You said a jury did not find him guilty, yet he didn't ask for a jury trial.

MR. GREGORY: The Court made the decision, which the Court has full authority to, and made it based on the facts and the discretion the Court has and done so.

[50] THE COURT: All right. The only thing before the Court is a violation of probation.

MR. GREGORY: Yes, sir, and the basis for the VOP that you heard has been the allegations of criminal activity. My client has not pled guilty to that. Whereas, Your Honor, in Mr. Johnson's case, the gentleman did plead guilty to it.

THE COURT: All right.

MR. GREGORY: You have an admission of guilt versus one where you determined the other one, similarly situated, similar major offenses, not the exact same charges, but similar major charges and Mr. Johnson, as I understand, received a three year sentence concurrent—or as I understand, the sentences were concurrent in his two cases. And based on being similarly situated, although again not the exact same charges as to the new charges each had, again, them not involved in the same—the same alleged victims, no other codefendants as to the new allegations, I'd ask the Court to impose a sentence

based on the violation and all the points to a three year term.

THE COURT: Under what legal basis do I have with the guidelines at 60 months to life?

MR. GREGORY: The deviation, Your Honor, based [51] on a request for deviation that I believe I addressed at the original VOP hearing for the downward departure at length and detail and I will go through it again.

THE COURT: So what are you asking the deviation be based upon?

MR. GREGORY: Based on the matter that I discussed before involving—I went through the analysis; that I stand by that and incorporate it now and again mention it again if you need me to do that and the additional circumstances.

THE COURT: You can do it again, Mr. Gregory, if you want to. I just want to make sure that that is what it is based upon. If there is something else that you want to present, you can certainly do that. If you want to present it, you can certainly do that.

MR. GREGORY: That is part of the reason, Your Honor, for the downward departure, and the other reasons were because of the lack of sophistication, lack of planning, and the other circumstances which I have already apprised the Court of before.

With the Court's permission I will turn to Mr. Graham.

Is there anything you would like to put before [52] the Court at this time?

THE COURT: All right.

MR. GREGORY: Mr. Graham, is there anything else—please stand, sir. Anything else that you would like to say to the Court at this time? You do not have to say anything. If you want to say anything, this is your opportunity, sir.

You need to come forward.

THE COURT: All right, Mr. Graham, go ahead and raise your right hand to be sworn.

THE CLERK: Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth so help you God?

THE DEFENDANT: I do.

THE COURT: Go ahead, sir.

TERRANCE JAMAR GRAHAM,

having been produced and first duly sworn, testified as follows:

THE DEFENDANT: Speaking on everything in my violations of probation?

THE COURT: It is up to you.

MR. GREGORY: The violation of probation the Court is hearing right now.

THE DEFENDANT: Well, it was because—with [53] your permission?

THE COURT: Sure.

THE DEFENDANT: Yes. Well, Your Honor, I would ask that you have mercy on my sentence due to the fact of some things that being . . . . . on the case that it is unlike the victim stated that he identified me at 9:20, being—me being at my residence at 9:30. I cannot really understand how he can identify me at 9:20. I wasn't arrested until 9:30.

Also the victim on the police report, all reports I got, stated that I was at the residence and the robbery happened at 9:30, and when I come to the probation hearing changes the robbery to 7:00. So they said the robbery happened at 7:00. I do not understand how they can do that.

THE COURT: Well, we are past that part. We are now at the point where you are going to be sentenced. If you have something to tell me in relation to what your sentence should be, that is what I would focus on. But you can tell me whatever you want to tell me. But what is going to concern me the most is what your sentence should be.

THE DEFENDANT: Yes, sir.

[THE COURT]: And given the fact that you have [54] been placed on probation—

THE DEFENDANT: Yes, sir.

THE COURT: —that you were given a chance to turn your life around and then you threw that chance away by violating your probation, at the very least by your own admission that you fled from the police at the very least.

THE DEFENDANT: Yes, sir. Well, Your Honor, I have been—I have been trying to better myself. I have been taking my GED class down at the jailhouse trying to finish my education down there. And I have been talking to one of the people at the Job Corps. They said they would accept me into the Job Corps if I am able to get out.

My family has moved to Georgia due to a certain family situation and that it is very hard for me to talk to my family. Every time we call it is $17.00 a call so I don't really get to talk to my family that much.

My mom, I barely get time to see her, and she have already lost one job due to taking off work and coming to court and stuff.

Your Honor, I just ask could I have a second chance to go home with my family. You know, I know that I'm in a tough situation right now that I put [55] myself in.

THE COURT: Why did you put yourself into that?

THE DEFENDANT: I ain't really tried to put myself into it. It happened at night and I manned

up to what I did. I did flee and elude from the police. But all the other allegations they brought against me—

THE COURT: Why did you do that?

THE DEFENDANT: Because I have a 10:00 curfew which I did make, which I was making every night, and either way it goes, if I would have missed my curfew I still would have been violated. I still like made my curfew. One of the officers came and tried to help me saying if I was at the hospital—

THE COURT: Why were you coming out of the hospital?

THE DEFENDANT: I was dropping a person off.

THE COURT: Who was that?

THE DEFENDANT: Meigo Bailey.

THE COURT: Why were you dropping him off at the hospital?

THE DEFENDANT: He got shot.

THE COURT: All right.

THE DEFENDANT: And I just want to let you know I miss my family very much, and I understand how [56] serious this stuff is.

THE COURT: You what?

THE DEFENDANT: I understand this is a serious matter.

THE COURT: But do you?

THE DEFENDANT: Yes, sir.

THE COURT: Because you don't seem to.

THE DEFENDANT: Yes, sir.

THE COURT: Because if you understood how serious it was, I really fail to see why I would see you back.

THE DEFENDANT: Yes, sir.

THE COURT: Due to the fact you have been given such an opportunity to do something with your life, so this is your opportunity to come and convince me that you're deserving of another chance.

THE DEFENDANT: Yes, sir.

THE COURT: So if you want to say something else, remember that that is what this is all about.

THE DEFENDANT: Yes.

THE COURT: We are at the sentencing phase. Are you embarrassed somehow to talk in front of your family?

THE DEFENDANT: No, sir.

THE COURT: Well, then this is probably the [57] time to be the most candid with me that you have ever been.

THE DEFENDANT: Yes, sir.

THE COURT: Wouldn't you think?

THE DEFENDANT: Yes, sir.

THE COURT: Do you know what I mean by candid?

THE DEFENDANT: No, sir.

THE COURT: All right. In other words no more smoke. Give it to me as straight as you can give it to me.

THE DEFENDANT: Yes, sir. Your Honor—excuse me. I'm very nervous right now.

THE COURT: Well, you can take your time and relax.

Is that your father in the back? Your father is raising his hand.

Mr. Gregory, do you want to go back and talk to him for a moment?

MR. GREGORY: He wants to know if he can speak, Your Honor.

THE COURT: He can speak on behalf of Mr. Graham, certainly.

MR. GREGORY: Yes, sir.

THE COURT: And then if Mr. Graham wants to come back up and speak, he can certainly do that.

[58] MR. GREGORY: Yes, sir.

THE DEFENDANT: Your Honor, I ask if I could have a second chance, Your Honor, I don't know how that I can convince you that I am a changed man.

THE COURT: By telling me what actually happened. Why did you really flee from the police?

THE DEFENDANT: Yes, sir. I was scared.

THE COURT: Why?

THE DEFENDANT: Because of what—because of what was going on.

THE COURT: And what was going on?

THE DEFENDANT: Somebody had got shot. It was the first time I had experienced someone getting shot.

THE COURT: Why is it that when you were given this opportunity you got right back into it hanging around with the same people that were only going to hurt you? Why would you put those friendships over your own family? You don't see them down here talking on your behalf, do you?

THE DEFENDANT: No, sir.

THE COURT: You haven't seen Mr. Lawrence come in here and talk on your behalf?

THE DEFENDANT: No.

THE COURT: Is it Kirkland Lawrence?

[59] MR. GARDNER: Yes, sir.

THE COURT: You haven't seen Mr. Lawrence come in here and say give my friend Mr. Graham a chance, have you?

THE DEFENDANT: No, sir.

THE COURT: Why do you think that is?

THE DEFENDANT: He don't care about me.

THE COURT: Who do you think cares about you the most?

THE DEFENDANT: My family.

THE COURT: Yet you abandoned your family to hang around these so-called buddies of yours, and then you look around this room and you see who is here for you, and you didn't think about that. You got put on a probation which was an opportunity that was a contract with the Court. That was an opportunity to turn your life around and do everything you were supposed to do. And what did you do? You went right back to your old ways and fell in with your group again, your so-called friends. Now why did you put those friends over your family?

THE DEFENDANT: I wasn't thinking. I didn't see it that way.

THE COURT: What is Mr. Bailey—isn't [60] Mr. Bailey part of all this?

MR. GARDNER: Yes, sir. His case it is set for trial in May.

THE COURT: Is Mr. Graham a witness in that case?

MR. GARDNER: No, sir.

MR. GREGORY: Not at this point. It has not been negotiated because there has been no plea in that case. He may become a witness, but not at this moment, sir.

THE COURT: All right. Mr. Graham, why don't you go ahead and have a seat for a moment and let me hear from your father. Then I'll bring you back up.

(The defendant resumes his seat at counsel table.)

MR. GREGORY: Come forward, sir, with the Court's permission.

THE COURT: Sure. Mr. Graham.

MR. GREGORY: His name isn't Mr. Graham. That is why he hesitated. It's Mr. Jones.

THE COURT: I am sorry, Mr. Jones.

THE WITNESS: Yes. Good afternoon, Your Honor.

THE COURT: Go ahead and raise your right hand to be sworn in by the clerk.

THE CLERK: Do you solemnly swear or affirm [61] that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth so help you God?

THE WITNESS: Yes, sir. How are you doing, Your Honor?

HARRY JONES,

having been produced and first duly sworn as a witness on behalf of the defendant, testified as follows:

DIRECT EXAMINATION

BY MR. GREGORY:

Q Introduce yourself to the Court. What is your relationship to Mr. Graham?

A Okay. Yes, sir, my name is Harry Jones. I'm Terrance Graham's biological father. At the time of the incident Terrance was living with me and his mother.

I apologize to the Court for what happened. I take some of the fault because I let Terrance use the car that night. He didn't get that car until after 5:00.

That neighborhood we live in, it is a drug-infested neighborhood. You've got a lot of pressure on your kids. We do our best in steering the child to go the right way. It is hard for kids coming up with all of that pressure.

Like I said, he is not a bad kid. I hope the Court will be lenient on him. And once he is through [62] with this, he can move to Georgia. We kind of live in the country now. I'm trying to set up a program for him there so he would have a better life with schooling and go to work. I have got my own business. I work in the church, plus I do construction of my own. He has got an opportunity waiting for him. I have got all doors waiting on him. We need him to get on out. I am asking the Court to be lenient on him.

Q Are you speaking to the Court about the Job Corps situation?

A On the Job Corps if he is not convicted of any more felonies or anything. If he is not, they would be willing to negotiate and let him in there.

Q Is there anything else you would like to say on your son's behalf with respect to sentencing, which is where you are right now? This is your last opportunity, sir.

A As far as sentencing, personally I don't believe sending him off for a long time will do any good for him. Like I said, Terrance is not a bad child. He has just been around some people that made some [b]ad choices, and he got caught up in it. The incident

he has been caught up in he wasn't totally responsible. He was just more or less in the wrong place at the wrong time. Poor judgment. Most kids do coming up. Terrance yet is [63] mature. He has been in the system since 15. He has matured from a child's mind, you know. There is not too much more I can say, Your Honor. I ask you to be lenient on him.

THE COURT: Is there any cross from the state?

MR. GARDNER: Just briefly.

CROSS-EXAMINATION

BY MR. GARDNER:

Q You were saying he took your car after 5:00?

A It was after 5:00. I can verify that because he came to me. I was playing cards with friends. I can also get them.

Q You also said he has been caught up in a couple of incidents; is that correct?

A Well, what I'm saying is that when you—as kids we have too much peer pressure. I have been through the system too myself. You are growing up in a drug-infested neighborhood. No matter how much as parents we try to talk to them, they have friends. They have got to go to school, to the neighborhood store. It is hard. You are going to go against the grain. I have been trying to go against the grain.

But that incident that night, I don't know why he allowed them boys to call him to pick them up and take them to the hospital where this happened, you know. But [64] I wish I hadn't let him use the car because Terrance was in a corner. It was only so he could get back and forth to the probation place. If I hadn't let him use the car, since the incident happened that night, we wouldn't even be here.

THE COURT: Well, was [sic] does Mr. Lawrence say about all this?

MR. GARDNER: Mr. Lawrence, he gave several statements to the police that I think he initially told Officer Swanson when he first approached him at Memorial Hospital, he told him—he asked him what happened and he said he was partying somewhere at Wacko's on Emerson when Meigo Bailey got shot. He then confronted him again and asked him about it, and he said they were at Wolfson High School, I believe, and they were out there and there were some words, Meigo Bailey got shot.

And then when interviewed by robbery detectives, he gave another story where he said he was at—by a girl's club with Meigo Bailey, and they were parting with some girls and some words got thrown and he got shot.

THE COURT: Well, now that he has pled and we're awaiting sentencing, has anybody asked him what Mr. Graham's role in all of this was?

[65] MR. GARDNER: I haven't had the opportunity yet. That was just this morning. He never indicated that he—today was the first day he had ever come back with anything substantive as a counteroffer, so there had been nothing to do when Mr. Graham was interviewed by the police. He admitted that he was involved in the robbery at Mr. Rodriguez' home as well as a variety of other things that aren't before the Court.

MR. GREGORY: Our records, Your Honor, not—knowledge from speaking with counsel and his representation as to what my client allegedly said, we didn't have that for the record.

THE COURT: You didn't, that he gave that statement to the police?

MR. GREGORY: Yes, sir. He denied that he confessed to being involved in the robbery as the state is inferring he is involved in, allegations. Yes, sir, that is right. He has not entered a plea of guilty at this point. For the record we have to maintain that. Yes, sir.

THE COURT: Mr. Jones, do you have anything else that you want to say?

THE WITNESS: No, sir.

THE COURT: Thank you.

[66] MR. GREGORY: I asked if he wanted his son, Mr. Graham's brother, to say anything. He told me no.

THE COURT: Mr. Graham, do you want to come back up? Is there anything else you want to say? Now is a good time to tell me.

THE DEFENDANT: No.

MR. GREGORY: Keep your voice up, please, sir.

THE DEFENDANT: I just ask for your mercy, Your Honor. I'm not a bad child, Your Honor. I do ask for a chance, Your Honor. I just want to go home to my family, Your Honor. My family have moved away to Georgia. Your Honor, I'm just asking for a second chance, Your Honor, because we—I just miss my family, Your Honor.

THE COURT: Whose fault is that?

THE DEFENDANT: Mine.

THE COURT: All right. So why would I consider that if you didn't consider it beforehand?

THE DEFENDANT: Your Honor, like I said before, I wasn't thinking, Your Honor. I just—I got so much—I wasn't thinking, Your Honor. I didn't know how much my family meant to me until now. I just apologize for what all went down, what happened, Your Honor.

[67] THE COURT: What all went down and what happened?

THE DEFENDANT: I fled the way I did, Your Honor, I fled, but the other charge that they are trying to pin against me, Your Honor, I had nothing to do with. I don't even see how I came to the probation before going to trial on a charge. And I would just like a chance to get out and get on the right track, Your Honor, like as far as I was saying.

THE COURT: What is the statement that he allegedly gave to the police?

MR. GARDNER: Your Honor, I believe it is in the transcript of the hearing, but to the best of my recollection Detective Kee was interviewing the defendant. He asked Mr. Graham specifically other than the two robberies tonight how many others have you been involved in, and then he began to elaborate on some other crimes that he committed, so . . .

THE COURT: Do you have any response to that if you want to?

THE DEFENDANT: Your Honor, I didn't make that statement. I don't know how that statement got brought up in the—or whatever. The only thing that I—the statement I made I told them was to [68] get me a lawyer. My dad was present a little later after what was going on, and everything that I said was recorded with me and my father, and Detective Kee wasn't the detective that was questioning me. It was Parrales that was questioning me. Kee was in there, but he wasn't the one that was questioning me.

THE COURT: Why don't we do this: Why don't we wait for Mr. Lawrence's sentencing. Mr. Graham can actually be here that day.

Mr. Gregory, can you be here that day? I can ask Mr. Lawrence some questions to take into account for his sentencing and wait until Mr. Bailey's case is disposed of, and then I will make a decision as to Mr. Graham.

MR. GREGORY: We can do that, Your Honor.

THE COURT: Does that seem fair, Mr. Graham?

THE DEFENDANT: Yes, sir.

MR. GREGORY: We appreciate the Court's discretion. I would bring up one thing before we do that—two quick things, Your Honor.

THE COURT: Sure.

MR. GREGORY: If I could question my client.

DIRECT EXAMINATION

BY MR. GREGORY:

[69] Q Do you have any infractions, any episodes or been written up while you have been in jail awaiting this charge?

A No.

Q Instead you have gone forward with your GED and otherwise behaved as an inmate should without having any incidents?

A Yes, sir.

Q Any problems?

A No.

Q If the Court gave you another chance, what would you do different without saying all over again what you just said, what would you do differently?

A Stay in the house with my—stay more intimate with my family, and I would—I have got plans to enroll in the Job Corps, try to—I've got my GED—to better myself.

Q Were you using marijuana or drugs or whatever during this time of the these allegations?

A No, sir.

Q You don't have any drug problem?

A No, sir.

Q You just did something stupid?

A Yes, sir.

MR. GREGORY: Nothing further at this point, [70] Your Honor. I will defer to a later time. Thank you for Your Honor's indulgence.

THE COURT: When is Mr. Bailey's case set for trial?

MR. GARDNER: The week of May 8th, Your Honor.

MR. GREGORY: Do you want to see Mr. Graham's GED paper, Your Honor? I don't know if you have it. I did mention it. I will show it to Your Honor for the record.

THE COURT: Fine. Why don't we go ahead and enter it into the record.

MR. GREGORY: Yes, sir. Thank you, sir.

MR. GARDNER: I would make one request.

THE COURT: What is that?

MR. GARDNER: I would just like the opportunity to at some point to question Mr. Graham on some of the things he testified to here today.

THE COURT: Why don't we do it at the final hearing.

MR. GARDNER: That is fine, Your Honor.

THE CLERK: Does Your Honor want the original entered or do you want a copy?

THE COURT: Make a copy for him.

MR. GREGORY: Thank you.

THE COURT: I will just give you this.

[71] MR. GREGORY: I'm going to make a copy for us. Thank you very much.

MR. GARDNER: Your Honor, I think Mr. Lawrence is passed for sentencing May 12th, that afternoon, at 2:30. Actually, it will be the end of the week of Mr.—

MR. GREGORY: Bailey.

MR. GARDNER: Yes.

THE COURT: So what is the date?

MR. GARDNER: I believe, Your Honor, it is May 12th at 2:30. Is that correct, Madam Clerk? It should be.

THE CLERK: It is the 12th.

MR. GARDNER: At 2:30.

MR. GREGORY: May 12th at 2:30.

THE COURT: Let's go ahead and pass this also to May 12th at 2:30. Keep him separate from Mr. Graham—keep him separate from Mr. Lawrence.

MR. GREGORY: Your Honor, I would also ask the Court to allow—if I could be notified when Mr. Lawrence is expected to testify.

THE COURT: May 12th at 2:30.

MR. GREGORY: In the trial of Mr. Bailey.

THE COURT: I don't know if he is.

MR. GARDNER: No, sir, he is not.

[72] MR. GREGORY: He won't be? Then I will withdraw the question.

THE COURT: But if he is—

MR. GREGORY: Yes, sir.

THE COURT: —then we will make sure that Mr. Gregory is notified.

MR. GREGORY: That was my question. Thank you, sir.

THE COURT: Mr. Graham, I do want to say something. I want you to start thinking about this. Telling me the truth is probably the most important thing that you can do from my standpoint in helping me decide what the proper sentence should be in your case and also what if the Court were to give you another chance. I'm not saying I will. Candidly, you haven't convinced me yet.

So between now and the next day of your sentencing you need to decide exactly what you want to tell this Court and what you can say that will convince me to consider deviating from the guidelines because I haven't heard it at this point.

THE DEFENDANT: Yes, sir.

MR. GARDNER: Your Honor, may I be excused for my deposition?

THE COURT: Yes. Thank you.

[73] We will be in recess until Monday.

MR. GREGORY: Thank you, Your Honor.

THE COURT: The court is in recess until Monday.

(The proceedings were concluded at 4:05 p.m.)

[SEAL]

CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT OF FLORIDA

LANCE M. DAY
CIRCUIT JUDGE

DUVAL COUNTY COURTHOUSE
JACKSONVILLE, FLORIDA 32202

May 17, 2006

Darin Gardner, Esquire
Office of the State Attorney
330 E. Bay Street
Jacksonville, FL 32202

Rodney Gregory, Esquire
Attorney for Defendant
3900 Atlantic Boulevard
Jacksonville, Florida 32207

Re: State of Florida vs. Terrance Graham
Case No.: 16-2003-CF-11912-AXXX-MA
16-2004-CF-16505-AXXX-MA

(Filed June 20, 2006)

Dear Attorneys:

Please find enclosed a copy of correspondence received in my office in regard to the above referenced Defendant for your review. The original has been filed in the court file.

The Defendant is next scheduled for review before this Court on May 25, 2006.

Sincerely,

/s/ LMD
LANCE M. DAY

Enclosure
psy

cc:

5/14/2006

To the Honorable Judge Lance Day:

I am writing you at this time to let you know that I have no disrespect for you or the courts. I wish I could ask you for my son, Terrence Graham's life back, but I know I cannot because his life is in God's hand right now. I have prayed again and again, asking God to watch over him and take care of this devastating situation. I now know that this decision was one God had made long before any of us had ever thought about it, and whatever His will is shall be done.

I believe everyone has a purpose on Earth, and that I am not the first person to question God. I can only hope and pray God has a mission for Terrence that we are all unaware of at this point.

Another belief I have is that my son was not involved in the situation he is being accused of. I do not understand how no victims were able to be located for well over a year, and then all of a sudden this man, Carlos appears. I am convinced that this man has no idea what he is talking about. The

information he provided during the pre-trial was incorrect, from my son's age to the clothes my son was wearing to the time he claims my son supposedly came into his house. When he pointed Terrence out at the trial, it was as if he was coached, and actually did not have a clue as to what was going on or why he was there. It just makes me wonder what other lies he might be spreading around.

My son is also missing his personal belongings. There is no detective or officer who has been able to locate the clothes he was wearing that night or his cell phone. The only item in his property at the jailhouse is a pack of Newports. Your Honor, my son is an athlete and has never smoked. I just feel that there are too many unanswered questions and open ends for my son to be sitting in a jail cell as long as he has been.

My son will admit, however, the only two things he is guilty of is giving a wounded victim a ride to the emergency room, and taking officers on a high speed chase. Sir, Terrence freely admits that the chase was wrong, but my son was so scared at the time, he felt he had no choice but to flee. I have always felt my son would always be honest with me, and I know he's telling the truth about this.

Judge Day, my son was doing so well before this unfortunate event. Terrence was attending high school everyday, made his curfew every night, and he never missed a probation meeting. He was really starting to get his life back on track when all of this

happened, and in an instant, his life was stolen. As you know, my family and I are living in a much better neighborhood in Georgia. I believe my son would do so well, if he were allowed to come home, and have his probation reinstated. I am only asking you to consider what I feel is a better chance for my son. Thank you and I appreciate your time very much.

Sincerely,

/s/ Mary Graham
Mary Graham

Circuit Court, Fourth Judicial Circuit of Florida
State of Florida v. Terrance Jamar Graham

(Filed May 25, 2006)

16-03-CF-11912-AXXX-MA

As a result of this violation I have learned how to be a better person in life. Before it was abstruse (difficult to understand) to [sic] what a positive citizen in society was. But due to my incarceration, I've learned that being a good person is not only thinking of others, but yourself, as well as your well being. I now know that I'll have to look at the big picture in life before I make any move or decision, because the wrong decision can cost you your life.

While incarcerated I've had ample amount of time to think about how I'm going to improve myself in life. First, I'm going to further my education (hand him G.E.D. papers & tell him passing score). As you can see I've tried to proceed with my schooling, but due to the circumstances I was unable to focus clearly. Secondly, I'm going to seek full-time employment to use my time wisely and make sure my chances of being put back in the same position I'm currently in are abated (lessen or reduce).

Once employed, I'm going to set me up a direct deposit bank account and assist my mother with these outstanding bills, that will take a load off her shoulders. My mother is going in forclosure on two houses. One is which I helped build from the ground up, where I share so many memories. This whole situation really puts a strain on my mother. She now

works twelve hours a day and is living from check to check trying to make ends meet, and by me being incarcerated it just adds extra stress, I know she doesn't deserve that, nobody does.

While employed, in my free time, I would like to be a public speaker to reach out to the youth, to let them know that jail is no place where they want to be and how I had to suffer for seventeen months, day for day, missing my family, friends and loved ones. I've been looking into starting my own barber shop business. After receiving my G.E.D. I'm going to enroll into barber school, which will take approximately 8 weeks to receive my certificate. My mother said it was a couple of vacant buildings where I can start up in Georgia where she now resides.

I have younger siblings, nieces and nephews who look up to me and I play a major role in their life, so I need to be there to help them excel in positive activities such as sports and schooling. The more I talk to my family and they tell me how my younger family members ask where I'm at I've come to grips that these children need models not critics, and I need to be there to nurture their love * * *.

* * *

Circuit Court, Fourth Judicial Circuit of Florida
State of Florida v. Terrance Jamar Graham

(Filed May 25, 2006)

RULE 3.992(a) CRIMINAL PUNISHMENT CODE SCORESHEET

1. DATE OF SENTENCE	2. PREPARER'S NAME	3. COUNTY	4. SENTENCING JUDGE
5-25-06	☐ DC ☒ SAO	Duval	Lance Day

5. NAME (LAST, FIRST, M.I.)	6. DOB	8. RACE	10. PRIMARY OFF. DATE	12. PLEA ☐ TRIAL ☒
Graham, Terrence	[Date Of Birth Omitted]	☒ B ☐ W ☐ OTHER	7-18-03	VOP Hearing
	7. DC # J25706	9. GENDER ☒ M ☐ F	11. PRIMARY DOCKET # 03-CF-11912	

289

I. **PRIMARY OFFENSE:** If Qualifier, please check __A __S __C __R
(A=Attempt, S=Solicitation, C=Conspiracy, R=Reclassification)

Felony Degree	F.S.#	Description	Offense Level	**Points**
1ST PBL	810.02 /	Armed Burglary	8	

(Level – Points: 1=4, 2=10, 3=16, 4=22, 5=28, 6=36, 7=56, 8=74, 9=92, 10=116)

Prior capital felony triples Primary Offense points ☐ **I.** 74

II. **ADDITIONAL OFFENSE(S):** Supplemental page attached ☐

Docket #	FEL/MM Degree	F.S.#	Offense Level	Qualify A S C R	Counts	Points	Total
/	2 /	812.13/ 777.04 /	7	☐ ☐ ☐ ☐	1	x 28	= 28
Description Att. Armed Robbery w/a weapon							
/	/	/	/	☐ ☐ ☐ ☐		x	=
Description							
/	/	/	/	☐ ☐ ☐ ☐		x	=
Description							

(Level – Points: M=0.2, 1=0.7, 2=1.2, 3=2.4, 4=3.6, 5=5.4, 6=18, 7=28, 8=37, 9=46, 10=58)

Prior capital felony triples Additional Offense points ☐ Supplemental page points

II. 28

III. **VICTIM INJURY:**

		Number	Total			Number	Total
2nd Degree Murder	240X		=	Slight	4X		=
Death	120X		=	Sex Penetration	80X		=
Severe	40X		=	Sex Contact	40X		=
Moderate	18X		=				

III. —

IV. **PRIOR RECORD:** Supplemental page attached ☐

FEL/MM Degree	F.S #	Offense Level	Qualify A	S	C	R	Description	Number	Points	Total
____ /	____ /	____ /	☐	☐	☐	☐	____ /	____	x ____	= ____
____ /	____ /	____ /	☐	☐	☐	☐	____ /	____	x ____	= ____
____ /	____ /	____ /	☐	☐	☐	☐	____ /	____	x ____	= ____
____ /	____ /	____ /	☐	☐	☐	☐	____ /	____	x ____	= ____
____ /	____ /	____ /	☐	☐	☐	☐	____ /	____	x ____	= ____
____ /	____ /	____ /	☐	☐	☐	☐	____ /	____	x ____	= ____

(Level – Points: M=0.2, 1=0.5, 2=0.8, 3=1.6, 4=2.4, 5=3.6, 6=9, 7=14, 8=19, 9=23, 10=29)

Supplemental page points ____

IV. —

V. Legal Status violation = 4 Points **V.** 6

VI. Community Sanction violation before the court for sentencing **VI.** —

6 points x each successive violation OR

New felony conviction = 12 points x each successive violation

VII. Firearm/Semi-Automatic or Machine Gun = 18 or 25 Points **VII.** —

VIII. Prior Serious Felony = 30 Points **VIII.** —

Subtotal Sentence Points 108

IX. Enhancements (only if the primary offense qualifies for enhancement)

Law Enforcement Protection	Drug Trafficking	Grand Theft Motor Vehicle	Street Gang	Domestic Violence (offenses committed on or after 10-1-97)
__ x 1.5 __ x 2.0 __ x 2.5	__ x 1.5	__ x 1.5	__ x 1.5	__ x 1.5

Enhanced Subtotal Sentence Points **IX.** —

TOTAL SENTENCE POINTS 108

SENTENCE COMPUTATION

If total sentence points are less than or equal to 44, the lowest permissible sentence is any *non-state prison sanction*.

If total sentence points are greater than 44:

108 (total sentence points) minus 28= 80 x .75 = 60 (lowest permissible prison sentence in months)

The maximum sentence is up to the statutory maximum for the primary and any additional offenses as provided in s. 775.082, F.S., unless the lowest permissible sentence under the code, exceeds the statutory maximum. Such sentences may be imposed concurrently or consecutively. If total sentence points are greater than or equal to 363, a life sentence may be imposed.

Life
maximum sentence
in years

TOTAL SENTENCE IMPOSED

		Years	Months	Days
☒ State Prison	☒ Life	Life		
☐ County Jail	☐ Time Served			
☐ Community Control				
☐ Probation				

Please check if sentenced as ☐ habitual offender, ☐ habitual violent offender, ☐ violent career criminal, ☐ prison releasee reoffender, or a ☐ mandatory minimum applies.

☐ Mitigated Departure ☐ Plea Bargain

Other Reason _____

JUDGE'S SIGNATURE	/s/ Lance Day

In the Circuit Court,
Fourth Judicial Circuit, in and
for Duval County, Florida

Division CR-C

Case Number
16-2003-CF-11912-AXXX-MA

✓ Probation Violator
___ Community Control Violator
___ Retrial
___ Resentence

State of Florida
v
TERRANCE JAMAR GRAHAM
Defendant

PROBATION OF 12-18-03
~~COMMUNITY CONTROL OF ___~~
SET ASIDE & REVOKED.

JUDGMENT

(Filed May 25, 2006)

The defendant, TERRANCE JAMAR GRAHAM, being personally before this court represented by R Gregory, the attorney of record, and the state represented by D Gardner, and having

___ been tried and found guilty by jury/by court of the following crime(s)

✓ entered a plea of guilty to the following crime(s)

___ entered a plea of nolo contendere to the following crime(s)

Count	Crime	Offense Statute Number(s)	Degree of Crime	Case Number	OBTS Number
1	Armed	810.02(2)(a)	1°F		
	Burglary	810.02(2)(b)			
	with				
	assault or				
	Battery				
2	Attempted	812.13(2)(b)	2°F		
	Armed	777.04(1)			
	Robbery				

✓ and no cause being shown why the defendant should not be adjudicated guilty, IT IS ORDERED that the defendant is hereby ADJUDICATED GUILTY of the above crime(s).

✓ and having been convicted or found guilty of, or having entered a plea of nolo contendere or guilty, regardless of adjudication, to attempts or offenses relating to sexual battery (ch. 794), lewd and lascivious conduct (ch. 800), or murder (s. 782.04), aggravated battery (s. 784.045), burglary (s. 810.02), carjacking (s. 812.133), home invasion robbery (s.812.135), robbery (s. 812.13), or robbery by sudden snatching (s. 812.131), chapter 787 kidnapping, false imprisonment, luring or enticing a child, and interference with custody; or any other offense specified in section 943.325, the defendant shall be required to submit blood specimens or other approved biological specimens.

____ and good cause being shown; IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD

Imposition of Sentence Stayed and Withheld (*Check if Applicable*)	___ The court hereby stays and withholds the imposition of sentence as to count(s) ___ and places the Defendant on probation/community control for a period of _____ under the supervision of the Department of Corrections (conditions of probation/community control set forth in separate order.)

FINGERPRINTS OF DEFENDANT

[Fingerprints Omitted In Printing]

Fingerprints taken by: K.L. Colletti #9544 (Name) Judicial Officer (Title)

I HEREBY CERTIFY that the above and foregoing are the fingerprints of the defendant, TERRANCE JAMAR GRAHAM, and that they were placed thereon by the defendant in my presence in open court this date.

DONE AND ORDERED in open court in Jacksonville, Duval County, Florida, this 25th day of May, 2006.

/s/ Lance M. Day
Judge

CHARGES/COSTS/FEES

The defendant is hereby ordered to pay the following sums if checked:

✓ $50.00 pursuant to section 938.03, Florida Statutes (Crimes Compensation Trust Fund). [As Prev Imp]

✓ $3.00 as a court cost pursuant to section 938.01(1), Florida Statutes (Additional Court Cost Clearing Trust Fund). [As Prev Imp]

____ $2.00 as a court cost pursuant to section 938.15, Florida Statutes (Criminal Justice Education by Municipalities and Counties).

____ A fine in the sum of $ ___ pursuant to section 775.0835, Florida Statutes. (This provision refers to the optional fine for the Crimes Compensation Trust Fund and is not applicable unless checked and completed. Fines imposed as a part of a sentence to section 775.083, Florida Statutes are to be recorded on the sentence page(s).)

____ $20.00 pursuant to section 938.09, Florida Statutes (Handicapped and Elderly Security Assistance Trust Fund).

____ A 10% surcharge in the sum of $ ___ pursuant to section 938.11, Florida Statutes (Handicapped and Elderly Security Assistance Trust Fund).

____ A sum of $ ___ pursuant to section 938.27, Florida Statutes (Prosecution/Investigative Costs).

____ A sum of $ ___ pursuant to section 938.29, Florida Statutes (Public Defender Fees).

____ $15.00 pursuant to 938.13, Florida Statutes, Misd. convictions involving drugs or alcohol.

✓ $200.00 pursuant to section 938.05, Florida Statutes (Local Government Criminal Justice Trust Fund). [As Prev Imp]

____ A sum of $ ___ pursuant to 938.04, Florida Statutes (additional cost—5% of fine).

____ $135.00 pursuant to section 938.07, Florida Statutes EMS—DUI cases).

____ $100.00 pursuant to section 938.25, Florida Statutes, (FDLE Operating Trust Fund).

____ A sum of $ ___ pursuant to 938.23, Florida Statutes, (Grants For Alcohol & Other Drug Abuse Program—Drug Abuse Trust Fund).

____ A sum of $ ___ pursuant to 939.18, Florida Statutes, (Assessment of Additional Court Costs for Court Facilities—not to exceed $150.00.

____ Restitution in accordance with attached order.

✓ A sum of $20 pursuant to 938.06, Florida Statutes, (Assessment of Additional Court Costs for Crime Stoppers Trust Fund—not to exceed $500.00. [As Prev Imp]

✓ A sum of $3.00 pursuant to 938.19, Florida Statutes, (Assessment of Additional Court Costs—Duval County Teen Court Trust Fund). [As Prev Imp]

____ A sum of $201.00 (Domestic Battery surcharge)[.]

____ A sum of $151.00 pursuant to 938.085, Florida Statutes (Rape Crisis Trust Fund).

____ A sum of $ ___ pursuant to 939.185, Florida Statutes, (Assessment of Additional Court costs to be used for innovations, legal aid, law library, teen court programs—not to exceed $65.00).

____ Other _____

DONE AND ORDERED in open court in Jacksonville, Duval County, Florida, this ____ day of May 25, 2006, ___.

/s/ Lance M. Day
Judge

SENTENCE

(As to Count 1)

The defendant, being personally before this court, accompanied by the defendant's attorney of record R Gregory, and having been adjudicated guilty herein,

and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown.

(Check one if applicable.)

____ and the court having on ___ (date) deferred imposition of sentence until this date.

____ and the court having previously entered a judgment in this case on ___ (date) now resentences the defendant[.]

✓ and the court having placed the defendant on probation/~~community control~~ and having subsequently revoked the defendant's probation/~~community control~~.

It Is The Sentence Of The Court That:

____ The defendant pay a fine of $ ___, pursuant to section 775.083, Florida Statutes plus $ ___ as the 5% surcharge required by 938.04, Florida Statutes.

✓ The defendant is hereby committed to the custody of the Department of Corrections.

____ The defendant is hereby committed to the custody of the Sheriff of Duval County, Florida.

____ The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

To be Imprisoned (Check one; unmarked sections are inapplicable):

____ For a term of natural life.
__✓__ For a term of life.

____ Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order.

If "split" sentence, complete the appropriate paragraph.

____ Followed by a period of _____ on probation/ community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

____ However, after serving a period of _____ imprisonment in _____, the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

OTHER PROVISIONS

Retention of Jurisdiction	___	The court retains jurisdiction over the defendant pursuant to section 947.16(4), Florida Statutes.
Jail Credit	✓	It is further ordered that the defendant shall be allowed a total of 12 mos & 496 days as credit for time incarcerated before imposition of this sentence.
Prison Credit	___	It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.
Consecutive/ Concurrent As To Other Counts	___	It is further ordered that the sentence imposed for this count shall run (check one) ___ consecutive to ___ concurrent with the sentence set forth in count _____ of this case.

SENTENCE

(As to Count 2)

The defendant, being personally before this court, accompanied by the defendant's attorney of record R Gregory, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the

defendant should not be sentenced as provided by law, and no cause being shown.

(Check one if applicable.)

_____ and the court having on ___ (date) deferred imposition of sentence until this date.

_____ and the court having previously entered a judgment in this case on ___ (date) now resentences the defendant[.]

__✓__ and the court having placed the defendant on probation/~~community control~~ and having subsequently revoked the defendant's probation/~~community control~~.

It Is The Sentence Of The Court That:

____ The defendant pay a fine of $ ___, pursuant to section 775.083, Florida Statutes plus $ ___ as the 5% surcharge required by 938.04, Florida Statutes.

__✓__ The defendant is hereby committed to the custody of the Department of Corrections.

____ The defendant is hereby committed to the custody of the Sheriff of Duval County, Florida.

____ The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

To be Imprisoned (Check one; unmarked sections are inapplicable):

____ For a term of natural life.
__✓__ For a term of 15 yrs.

___ Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order.

If "split" sentence, complete the appropriate paragraph.

___ Followed by a period of _____ on probation/ community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order entered herein.

___ However, after serving a period of _____ imprisonment in _____, the balance of the sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

OTHER PROVISIONS

Retention of Jurisdiction ___ The court retains jurisdiction over the defendant pursuant to section 947.16(4), Florida Statutes.

Jail Credit ✓ It is further ordered that the defendant shall be allowed a total of 12 mos & 496 days as credit for time incarcerated before imposition of this sentence.

Prison Credit ___ It is further ordered that the defendant be allowed credit for all time previously served on this count in the Department of Corrections prior to resentencing.

Consecutive/ Concurrent As To Other Counts ✓ It is further ordered that the sentence imposed for this count shall run (check one) ___ consecutive to ✓ concurrent with the sentence set forth in count 1 of this case.

OTHER PROVISIONS

Consecutive/ Concurrent As To Other Convictions ___ It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run (check one) ___ consecutive to ___ concurrent with the following: (check one)

_____ any active sentence being served

_____ specific sentences: _____

_____

_____

_____

In the event the above sentence is to the Department of Corrections, the Sheriff of Duval County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the department together with a copy of this judgment and sentence and any other documents specified by Florida Statute.

The defendant in open court was advised of the right to appeal from this sentence by filing notice of appeal within 30 days from this date with the clerk of this court and the defendant's right to the assistance of counsel in taking the appeal at the expense of the State on showing of indigency.

In imposing the above sentence, the court further recommends _____

_____

_____

_____

_____

DONE AND ORDERED in open court at Jacksonville, Duval County, Florida, this _____ day of _____, ___.

/s/ Lance M. Day
Judge

_____

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO. 16-2003-CF-11912-AXXX-MA

DIVISION: CR-C

STATE OF FLORIDA

-vs-

TERRANCE GRAHAM

ORDER

(Filed May 25, 2006)

THE DEFENDANT WAS PLACED ON PROBATION IN THE ABOVE STYLED CASE FOR A PERIOD OF 3 YEARS AND ON THE 13TH DAY OF DECEMBER 2004 AN AFFIDAVIT FOR VIOLATION OF PROBATION WAS MADE AGAINST THIS DEFENDANT, A COPY OF WHICH HAS BEEN SERVED ON THIS DEFENDANT.

THE DEFENDANT, ACCOMPANIED BY HIS/HER ATTORNEY R. GREGORY, (ADMITTED THE VIOLATION OF PROBATION) [#4 Fleeing & Attempting to Elude] (REQUESTED AND WAS GRANTED A HEARING), [(4) Home Invasion Robbery; (3) Possession of Firearm; (5) Associating with Know [sic] Criminals.] AND THE COURT, HAVING HEARD THE FACTS CONSTITUTING THE BASIS FOR SUCH AFFIDAVIT FOR VIOLATION OF PROBATION, AND BEING FULLY ADVISED THEREIN FINDS THE DEFENDANT IN VIOLATION

OF CONDITIONS #3, 4 (Fleeing & Attempting to Elude & Home Invasion Robbery) & 5.

IT IS ORDERED THAT THE PROBATION OF THE 18TH DAY OF DECEMBER, 2003 BE, AND THE SAME IS HEREBY REVOKED.

DONE AND ORDERED IN OPEN COURT AT JACKSONVILLE, DUVAL COUNTY, FLORIDA THIS _____ DAY OF MAY 25 2006.

/s/ Lance M. Day
CIRCUIT JUDGE

IN THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT, IN AND
FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16 2003 CF 11912 AXXX MA

DIVISION: CR-C

STATE OF FLORIDA

-VS-

TERRANCE JAMAR GRAHAM,

Defendant.

(Filed Jul. 25, 2006)

TESTIMONY AND PROCEEDINGS taken on * * * **Thursday, May 25, 2006,** before **The Honorable Lance M. Day,** Judge of the Circuit Court, Division CR-C, in the Duval County Courthouse, Jacksonville, Florida, and as reported by Jayne McCully, Court Reporter and Notary Public in and for the State of Florida at Large.

– – –

[2] APPEARANCES:

DARIN GARDNER, Esquire,

Appearing on behalf of the State.

RODNEY G. GREGORY, Esquire,

Appearing on behalf of Terrance Graham.

MICHELLE KALIL, Esquire,

Appearing on behalf of Kirkland Lawrence.

[3] INDEX

DEFENDANT'S WITNESSES PAGE

* * *

TERRANCE GRAHAM READS LETTER TO THE COURT 133

TERRANCE GRAHAM

Direct Examination Continued 136

Cross-Examination 140

STATE'S WITNESSES

* * *

[4] **CARLOS RODRIGUEZ**

Direct Examination 78

Cross-Examination by Ms. Kalil 84

Cross-Examination by Mr. Gregory 85

WITNESSES CALLED ON BEHALF OF KIRKLAND LAWRENCE

ANTOINETTE LAWRENCE

Direct Examination 93

ANDREA MITCHELL LAWRENCE

Direct Examination 98

KIRKLAND GEORGE LAWRENCE

Direct Examination 104

Cross-Examination by Mr. Gardner 108

Cross-Examination by Mr. Gregory 121
Recross-Examination by Mr. Gardner 126

– – –

EXHIBITS

* * *

State's
in Evidence (Kirkland Lawrence)
Nos. 1, 2 and 3 120

[5] PROCEEDINGS

* * *

[73] May 25th, 2006 2:34 p.m.

(Mr. Lawrence is present. Mr. Graham is absent.)

THE COURT: All right, are we ready to bring in—are we ready on Kirkland?

MS. KALIL: Kirkland Lawrence, yes, sir.

MR. GREGORY: Your Honor, can Mr. Graham be brought out so he can hear what is going on . . .

THE COURT: I don't see the need in that.

MR. GREGORY: You had said before you wanted to have him to be able to hear what happened to Mr. Kirkland Lawrence's case so he can speak to the Court as to anything else he wanted to say as to what occurred.

MS. KALIL: Your Honor, my only concern is I know Mr. Lawrence will be testifying and providing information, and I think it would be better if Mr. Graham was not in the courtroom at that time.

THE COURT: Well, when we get to the sentencing [74] we can certainly bring him out.

MR. GREGORY: All right, sir.

THE COURT: Let me see the jail jackets, please, for both of them, Lawrence and Graham.

Show that Mr. Lawrence is before the Court. We are here on a sentencing hearing. The defendant has pled guilty to count 1. I'm showing it is an attempted armed robbery with a firearm. The negotiations are a range of 10 years Florida State Prison with a 10-year minimum mandatory, to a range of 15 years Florida State Prison. But either way the minimum mandatory is 10 years. So really it's a five year difference that has to be determined by the Court at the sentencing hearing today.

MR. GARDNER: Yes, Your Honor.

THE COURT: And then there would be court costs that have already been agreed upon at $341.00 and a $90.00 public defender lien, and the issue of restitution is going to be discussed today if there was any.

MR. GARDNER: There is no restitution, Your Honor.

THE COURT: And then the state was going to drop counts 2, 3, and 4 according to my notes?

MR. GARDNER: Yes, sir, that's correct, Your [75] Honor.

THE COURT: Then I have before me a presentence investigation. Have both sides had a chance to go through the PSI?

MS. KALIL: Yes, Your Honor.

MR. GARDNER: Yes, sir. There was one mistake, Your Honor, and it is partly my fault. The actual maximum sentence on it would be 15 years because it is a—second degree felony, not a first. That is the only problem I saw. But it doesn't affect his sentencing range before the Court today.

THE COURT: All right. I will change that to second then. I appreciate you pointing that out. Does the defense have any corrections?

MS. KALIL: Yes, Your Honor, on page four of the PSI underneath the education. Mr. Lawrence actually has his high school diploma. It incorrectly stated that he had only completed the tenth grade.

THE COURT: I'll put high school diploma. Any other corrections from either side?

MS. KALIL: No, Your Honor.

THE COURT: From the state?

MR. GARDNER: No, sir, Your Honor.

THE COURT: All right. Then the Court will [76] receive the PSI then as presented.

MR. GARDNER: Your Honor, I have an order denying restitution for this particular case. I will tender it to the clerk.

THE COURT: Ms. Kalil, do you want the state to go ahead and go first?

MS. KALIL: Yes, Your Honor.

THE COURT: Then does the state have any witnesses to call?

MR. GARDNER: Yes, sir, Your Honor, we have one witness. But before I call Mr. Rodriguez, I would just like the Court to acknowledge that the detectives who were involved in the task force in the Spanish robberies are present here in court today. That would be Detective Parrales, Detective Kee, and Detective Gupton from the homicide unit.

THE COURT: Well, thank you very much for taking the time to come down.

MR. GARDNER: We would call Mr. Rodriguez, Carlos Rodriguez. And we have an interpreter here, Your Honor.

THE COURT: All right, great.

MR. GARDNER: I believe she is qualified, Your Honor.

[77] THE COURT: Let's go ahead and swear in the interpreter. Have the witness come around in this area here.

If you will go ahead and raise your right hand and be sworn as the interpreter.

THE CLERK: Do you solemnly swear or affirm that you will well faithfully, fully, and truly interpret to the witness, Mr. Rodriguez, the questions propounded to him and to the Court the testimony and answers of said witness to said questions so help you God?

THE INTERPRETER: I do.

THE COURT: And if you would give us your full name for the record, please.

THE INTERPRETER: It's Laura Matos.

THE COURT: Ms. Matos, if you would stand over by Mr. Rodriguez so that you can interpret for him, please.

THE INTERPRETER: Yes, Your Honor.

THE COURT: All right. And then I will swear in Mr. Rodriguez. What is his full name?

MR. GARDNER: Carlos.

THE COURT: Mr. Rodriguez, if you will raise your right hand to be sworn. Do you swear or affirm that the testimony you are about to give in this

[78] cause will be the truth, the whole truth, and nothing but the truth so help you God?

THE WITNESS: Yes, I swear.

THE COURT: Go ahead and pull the mic down just a little bit so that . . .

Proceed, Counsel.

CARLOS RODRIGUEZ,

having been produced and first duly [s]worn as a witness on behalf of the state, testified as follows:

DIRECT EXAMINATION

BY MR. GARDNER:

Q Can you tell us your name, please.

A Carlos Rodriguez.

Q And how old are you, Mr. Rodriguez?

A I turned 30.

Q And where are you originally from?

A Col[o]mbia.

Q How long have you been in the United States?

A One year and seven months.

Q Are you working right now?

A Yes.

Q What do you do for a living?

A I work as a laborer in a construction company.

Q How long have you been doing that?

A It is has been a year and five months.

[79] Q Have you been employed virtually almost the whole time you have been in the United States?

A Yes.

Q Do you have family here?

A Yes.

Q Who would that be?

A My wife and my stepson.

Q Just briefly, Mr. Rodriguez, could you tell the Court how it is you came to Jacksonville?

A I came to Jacksonville via an agency for refugees. That is something that they have in my country as a consequence of the war going on.

Q Were you forced to leave your country in essence?

A Yes.

Q And to seek refuge in the United States?

A Yes.

Q Back in December of 2004 how long had you been here?

A In December?

Q Of 2004, yes.

A I got here in November. I don't remember very well.

Q So he hadn't been here very long. Is that fair to say?

[80] A Two months.

THE COURT: Let me just stop you for a second. Will he be testifying in the next case?

MR. GARDNER: Probably, yes, sir.

THE COURT: It might be easier just to go ahead and bring out the defendant for that case while he is testifying and then let him go back. That way you won't have to duplicate all of this.

MR. GARDNER: Sure. That would be fine if that is acceptable with the parties.

THE COURT: Is Mr. Gregory around here?

MR. GREGORY: Up here.

THE COURT: Is that agreeable, Mr. Gregory?

MR. GREGORY: Yes, sir. I didn't know he was going to testify again. He has testified already in my case.

THE COURT: Well, why don't we go ahead and bring him out so you can hear this.

MR. GREGORY: Yes, sir.

(Mr. Graham is present.)

THE COURT: We are not going to put the defendant near him. Just put the defendant over here somewhere.

THE BAILIFF: Yes, sir.

THE COURT: See if he would like some water [81] (referring to the witness).

We will show that Terrance Graham is also now present in the courtroom so he can hear the testimony of the witness.

Proceed, Counsel.

BY MR. GARDNER:

Q Mr. Rodriguez. I want to talk about December 2nd, 2004, just briefly, that evening. Can you briefly tell us what happened that evening?

A That day was a Thursday. It was about 7:00, 7:30 p.m. Someone knocked on my door, the door to my apartment. I was with a friend. They knocked three times. I opened the door and four or three guys came in with arms. They held one to my stomach, looking in—looking—they came looking for money, and they destroyed everything.

Q Now, Mr. Rodriguez, the gentleman sitting over there on the wall, you remember him, don't you?

A That was him. I do recognize him.

THE COURT: Referring to Mr. Graham?

MR. GARDNER: Yes, sir. I'm sorry, Your Honor.

BY MR. GARDNER:

Q Do you remember whether or not he was the first one in the door?

A Yes. He was the one.

[82] Q Was he the one, the first one that had the gun in your stomach?

A Yes.

Q Now, when these individuals came into your house did one of them appear to be the leader, the one giving orders, things of that nature?

A I think that the leader was the first one who walked through the door, the one that pointed the gun at my stomach.

Q You mean Mr. Graham, this one sitting over here?

A Yes.

Q Now, Mr. Lawrence, do you remember him being in there?

A Yes. I saw him also.

Q Was he armed with a firearm as well?

A Yes. Yes, he did have a firearm in his hand.

Q Do you recall whether or not he pointed the firearm at you?

A Yes. He pointed it at me.

Q Now, there came a point in time when you testified previously that you and your friend that you were with were placed in a closet; is that right?

A Yes. That's correct.

Q Now, at that point do you remember any of these [83] individuals cocking the gun?

A Yes.

Q Do you remember which one it was?

A It was him (pointing).

Q Referring to Mr. Graham?

A Yes.

Q Did he point the gun at you at that point?

A Yes.

Q What part of your body did he point the gun at?

A Head.

Q Were you scared?

A Very scared.

Q Did you think he was going to harm you?

A Yes, because he got the gun ready to fire.

Q Now, your friend that was there, do you remember what his name was?

A Noel.

Q Not Walter Balderas?

A No.

Q Now, just briefly tell the Court how the robbery, this experience, how it has affected your life?

A After this my family and I were very scared after everything that happened. We tried to come up with some money to be able to move somewhere else and to try to forget this. But I know this is very difficult to [84] forget. I think that now this has been an experience as well. It has gotten better, and this has been a lesson for me.

Q Is there anything else you'd like to tell the Court before imposing sentence?

A Although all of this has happened, I'm very saddened for the families of these young men, and I don't think that they should throw their lives away like this.

MR. GARDNER: I don't have anything further, Your Honor.

THE COURT: Any cross from Ms. Kalil first as to Mr. Lawrence? And then we will have cross from Mr. Gregory as to Mr. Graham.

CROSS-EXAMINATION

BY MS. KALIL:

Q Mr. Rodriguez, you stated that Terrance Graham, the man sitting over there, was the leader of the group?

A In my personal opinion, yes, I believe he was the leader of the group.

Q Did he seem to be giving orders to the other men that were present that night, also?

A I think so.

Q So he seemed to be running what was happening?

A Yes.

MS. KALIL: Thank you. I don't have anything [85] further.

THE COURT: Any cross—

MR. GREGORY: Yes, Your Honor.

THE COURT: —regarding Mr. Lawrence's case?

MR. GARDNER: Actually, it would be for Mr. Graham, Your Honor.

THE COURT: I'm sorry, Mr. Graham's case. I apologize.

CROSS-EXAMINATION

BY MR. GREGORY:

Q Do you recall testifying before at a hearing just for Mr. Graham, correct?

A Yes.

Q And you did not understand English very well at the time of this situation, the one that you were here for today, correct?

A That's correct.

Q You don't understand English very well now, correct?

A I'm learning.

Q But it's correct now, as it was correct the last time you testified, that you really couldn't tell what, if anything, Mr. Graham was saying because he was speaking, if at all, in English, correct?

A When one person speaks and the others obey, [86] that means that is the individual that has the authority.

Q But you are really speculating. You really don't know what he was saying, if he said anything; isn't that correct?

A But I understood the main thing which is what they were looking for.

Q Well, what your impression of what they may have been looking for is different from your understanding of what was being said; isn't that correct?

A I don't understand the question.

Q You can't tell the Judge, you can't tell the Court what was being said between the persons who were in your residence that day; isn't that correct?

A But I believe that the actions that they brought forth that day in my apartment are greater than anything they could have been saying.

Q So the answer is, yes, you cannot tell the Court what they were saying, correct?

A The truth is I think that he was—he is the leader.

MR. GREGORY: Your Honor, I don't think he has responded to my question, but I will move on. I think my point is made. I'll move on.

THE COURT: Let me do this. Ms. Matos, let's go ahead and use the mic for you actually because [87] you can hear him obviously.

THE INTERPRETER: Yes, sir.

THE COURT: It might be easier for you. Just kind of point it towards you and it will pick it up very well.

MR. GREGORY: Thank you, Your Honor.

MR. GREGORY:

Q So you don't know what was being said to you because no one spoke Spanish except for you and the person who was already in your residence, correct?

A But my friend has lived here five to six years, and he was understanding what they were trying to say.

Q Now, you understand that your friend is not here. I am not asking you to speak for whatever your friend may have told you at that time or at a later time, correct? Did you understand that, sir?

A Yes, I understand the question, but the only thing I want to say is that the only voice that I heard at that time was his, and when a person speaks and everybody else does what that individual says . . .

Q You saw people do certain things that day, correct?

A Yes.

Q And you cannot tell this Court that those persons were doing things because they were told to do [88] things by Mr. Graham or because they agreed with Mr. Graham or because they just wanted to? You can't tell the Court or distinguish between what you

saw and what was said only in English by Mr. Graham; isn't that correct?

A When an individual comes to your apartment and points at you with a gun, what can I say as far as that?

Q I don't think you answered any question.

If you would repeat my question to him.

THE COURT: I think he is trying to, Mr. Gregory.

MR. GREGORY: I know, but he ... ... what could he say? I'm not answering the question. I'm only asking him if he could distinguish between ... could he respond to that.

THE INTERPRETER: The interpreter requests a repetition of the question, please.

MR. GREGORY: I'll rephrase.

BY MR. GREGORY:

Q Your response of what to say or what can you say if someone puts a gun in your face does not answer my question. But my question is: Can you tell this Court that the activity you saw that day was because of what was said only in English by Mr. Graham or because those other persons agreed with Mr. Graham or because they did [89] what they wanted to do on their own?

MR. GARDNER: That is a compound question. I object.

THE COURT: I will sustain the objection.

MR. GREGORY: I'll break it down again.

BY MR. GREGORY:

Q You can't tell this Court if those persons did what they wanted to do independent of what was said only in English by Mr. Graham; isn't that correct?

A I really don't understand the question very well. It leaves me without a response. What is the point—what is the point that you're trying to make with your question?

Q The question simply is, You cannot tell this Court that what the other persons did was done because of what Mr. Graham told them and he only spoke in English?

A That is incorrect.

MR. GREGORY: I will move on, Your Honor.

THE COURT: Well, I need to have it cleared up.

If you would, ask the witness what makes him believe that Mr. Graham, the gentleman over there, was the ringleader?

Counsel, if you have a phone on—

MR. GREGORY: It's not going off.

THE COURT: It doesn't matter if it goes off.

[90] If it is on, it will set the—

MR. GREGORY: Yes, sir.

THE COURT: Is it off?

MR. GREGORY: No. I'll move over here.

THE COURT: Well, just turn it off. That is the easiest way.

MR. GREGORY: I'll do it.

THE WITNESS: Because he is the only person that was speaking. Everybody else was doing what he—everybody else was just doing things, and his was the only voice that I heard.

THE COURT: All right. Go ahead.

BY MR. GREGORY:

Q You did not see everything that occurred in your house that day with those persons present because you did not follow everyone around or see what everyone did; isn't that correct?

A Yes, that's correct.

MR. GREGORY: No other questions at this time, Your Honor.

THE COURT: Any redirect?

MR. GARDNER: No, sir, Your Honor.

THE COURT: Any further recross regarding Mr. Lawrence's case?

MS. KALIL: No, Your Honor.

[91] THE COURT: All right, anything else then for this witness?

MR. GARDNER: No, sir.

THE COURT: All right. If you would tell him to go ahead and have a seat, please.

(The witness resumed his seat in the courtroom.)

THE COURT: Call your next witness.

MR. GARDNER: We have no further evidence, Your Honor, just argument.

THE COURT: All right. Can the interpreter stand by just in case?

THE INTERPRETER: Yes, I will, Your Honor.

(The interpreter sits by Mr. Rodriguez in the audience to assist him.)

THE COURT: All right, then as to Mr. Lawrence's case, does the defense have any witnesses to call other than Mr. Lawrence?

MS. KALIL: Yes, Your Honor, we do.

THE COURT: All right.

MS. KALIL: Call Ava Lawrence.

MR. GARDNER: Your Honor, did you want Mr. Graham to go in the back?

THE COURT: Well, let me ask you this: What is the reason not to have Mr. Graham here so that that [92] way we don't have to keep going back and forth with him? Is there any special reason?

MS. KALIL: Your Honor, I think it would assist Mr. Lawrence in being able to speak more openly.

THE COURT: Well, the problem is that I mean Mr. Lawrence is going to be subject to cross-examination by Mr. Gregory, and it seems like his attorney is going to need to be here, and so I think Mr. Graham is going to need to be here to assist Mr. Gregory.

Mr. Lawrence needs to be focused on being open and direct with the Court and not worry about Mr. Gregory—I mean Mr. Graham.

So anyway, I'll leave him here.

(Mr. Graham and Mr. Gregory remain in the courtroom.)

THE COURT: Ma'am, come on up and have a seat and we'll go ahead and swear you in.

THE CLERK: Is she a witness in Mr. Lawrence's case or both cases?

THE COURT: We'll show them as both.

Go ahead, and if you would raise your right hand to be sworn. Do you swear or affirm that the testimony you are about to give in this cause will be

the truth, the whole truth, and nothing but the [93] truth so help you God?

THE WITNESS: Yes.

THE COURT: Have a seat and we'll adjust that mic for you.

Go ahead.

ANTOINETTE LAWRENCE,

having been produced and first duly sworn as a witness on behalf of Mr. Lawrence, testified as follows:

DIRECT EXAMINATION

BY MS. KALIL:

Q Ma'am, can you please state your name.

A Antoinette Lawrence.

Q And, Ms. Lawrence, what is your relationship to Kirkland Lawrence?

A His aunt.

Q And do you live here in Jacksonville?

A Yes.

Q How long have you resided in Jacksonville?

A Since 1989.

Q And do you currently work?

A Yes.

Q Where are you employed?

A Lanier Manor.

THE COURT: Where?

THE WITNESS: Lanier Manor.

[94] THE COURT: And where is that?

THE WITNESS: It is on New Berlin Road.

Q What sort of work do you do?

A I'm a CNA.

Q Is that a certified nursing assistance?

A Uh-huh (affirmative).

Q How long have you been employed there?

A I just started my new job two months ago.

Q Ms. Lawrence, you are here today to speak on behalf of your nephew. He is here for a sentencing hearing. Have you had a close relationship with Kirkland throughout his life?

A Yes.

Q Since about what age would you say?

A Since I came here in 1989.

Q So that was 17 years ago?

A Yes.

Q So Kirkland would have been a young child then?

A Yes.

Q Can you tell the Court a little bit about Kirkland as a person?

A Well, he was living with me when this happened, but I mean he is like fun. First can I just say something? That I want to apologize to the family, the—because I never did this before, but I really do want [95] to apologize to them, and I am really, really sorry. I'm really sorry. I want to apologize to you.

But Kirkland is really, really a fun—he is a good person. I never knew what was going on. He was staying—I have two kids. I have a nine-year-old and I have a one-year-old, and I trusted him with my kids, so . . .

Q So this behavior that he was arrested for is completely out of character for him?

A Completely.

Q As long as you've known Kirkland, would you say that he tends to follow others more than being a leader himself?

A I don't know how to answer that question. He is just like—he is 21 now, but his mentality is not like a 21-year-old. It is more like a child. It is like he laughs and plays a lot.

Q More of a—

A More playful.

Q It's more of an immature level?

A Yes.

Q Do you know Meigo Bailey?

A Yes.

Q And are you aware of the fact that Meigo Bailey is also one of the codefendants in this case?

[96] A Yes.

Q Did Kirkland have a close relationship with Mr. Bailey?

A As far as I seen, yes.

Q In your opinion would you say that Mr. Bailey was more of a leader in a relationship between he and Kirkland?

A No. They was the same. They was just playful and fun and just act like kids because they would be around my kids all of the time. I couldn't tell you who was the leader and who was not the leader. I really could not.

Q Do you know Terrance Graham?

A No, I do not.

Q Now, Mr. Lawrence has pled to a range of 10 to 15 years in Florida State Prison.

A Yes.

Q Is there anything that you would like the Court to know or that you would like to tell the Court about him or for the Court to consider for sentencing?

THE WITNESS: Your Honor, I would really like you to think about—because he is a young man, you know. His life has just began. I know what he was—is accused of. I know it's wrong, you know, and I feel real sorry for the family. If it happened to [97] me, I would probably feel the same way, but he do deserve a second chance.

You know, some people make mistakes, and you do learn from your mistakes. So I really would like it if you could just be lenient with him and try to understand that he is not a bad person. He is really not a bad person. He would never hurt anyone like that physically. He would not. So I mean that is it.

MS. KALIL: Thank you, ma'am.

THE WITNESS: Okay.

THE COURT: Any cross?

MR. GARDNER: No, sir, Your Honor.

THE COURT: All right, ma'am. Thank you very much. Go ahead and have a seat.

THE WITNESS: Thank you.

THE COURT: Call your next witness.

MS. KALIL: Andrea Lawrence.

THE COURT: Ma'am, if you will come down here and place your left hand on the Bible and raise your right hand to be sworn. Do you swear or affirm that the testimony you are about to give in this cause will be the truth, the whole truth, and nothing but the truth so help you God?

THE WITNESS: Yes.

[98] THE COURT: If you will have a seat and we will adjust that mic for you.

Proceed, Counsel.

ANDREA MITCHELL LAWRENCE,

having been produced and first duly sworn as a witness on behalf of the defendant, testified as follows:

DIRECT EXAMINATION

BY MS. KALIL:

Q Ma'am, please can you state your name.

A Andrea Mitchell Lawrence.

Q Ms. Lawrence, what is your relationship to Kirkland?

A His aunt.

Q Do you reside here in Jacksonville?

A Yes, I do.

Q How long have you lived in Jacksonville?

A Seventeen years.

Q Do you have a close relationship with your nephew?

A Yes, I do.

Q And you have had a close relationship with him the entire time you have lived in Jacksonville?

A Yes.

Q Ma'am, where was Mr. Lawrence living prior to being incarcerated?

[99] A My mother's and Antoinette's[.]

Q Is your mother Gloria Wickham?

A Yes, she is.

Q And that is Kirkland's grandmother?

A Yes.

Q And she could not be here today; is that correct?

A No, she couldn't.

Q And why is that?

A She is ill.

Q You provided me, you just provided me a letter that she wrote for the Court to read?

A I have.

Q Ms. Lawrence, are you familiar with Kirkland as a person—

A Yes, I am.

Q —outside of this courtroom experience?

A Yes, I am.

Q What can you tell the Judge about that?

A Kirkland is a very sweet person, and when I heard this everyone was shocked because that is not his personality. And it has really taken a toll on my mother as she was the one that raised him.

Q His grandmother essentially raised him from—

A Right.

[100] Q —when he was young?

A Yes.

Q Do you know why it is that she raised him?

A His mother couldn't be located. His father dropped him off to her.

Q So he was essentially abandoned?

A Basically.

Q And your mother and his grandmother essentially took on the responsibility of raising him?

A Yes.

Q You're aware of the fact that your nephew has been arrested in the past?

A Right.

Q But they have all been pretty minor offenses?

A Yes.

Q Obviously this is a very serious charge for which she [sic] has pled guilty to?

A Right.

Q What is it that you would like the Court to consider in consideration of sentencing him for your nephew?

A I would like him to consider that Kirkland is young and understand, you know, if you do something what is punishable but, you know, he is young and is basically rehabilitation for him, I would like that to be [101] considered, maybe give him a lesser time to be released and, you know, with the family's responsibility because . . .

THE COURT: And you understand, ma'am, that the minimum he is going to do is 10 years?

THE WITNESS: I understand.

THE COURT: I just wanted to make sure you understood the plea agreement.

THE WITNESS: Yes.

THE COURT: Go ahead, Counsel.

BY MS. KALIL:

Q Ma'am, one other thing I wanted to ask you. Do you know Meigo Bailey?

A Yes, I do.

Q That is Kirkland's cousin; is that correct?

A Right.

Q What can you say about Kirkland in terms of his associations with other people? Does he seem to be the leader when he is involved with other boys or has he kind of always been a follower?

A No. I wouldn't say he was the leader. Now . . . . . say Kirkland's mentality, you know, it's not at his age he is. Kirkland's mentality would be like 14 or 15.

Q So in terms of schooling, he graduated from high school; is that correct?

[102] A Yes, he did.

Q But you're saying that just his social skills—

A Right.

Q —are on a younger age?

A Right.

MS. KALIL: I don't have any further questions.

THE COURT: Any cross?

MR. GARDNER: No, sir, Your Honor.

THE COURT: All right. Call your next witness.

MS. KALIL: Your Honor, before I call Mr. Lawrence to the stand, I was just provided a copy of this letter, so I haven't had an opportunity to make copies of it, but it is from Gloria Wickham, Mr. Lawrence's grandmother. I can show it to the state and then provide it to the Court.

THE COURT: That would be fine.

And then, Ms. Matos, if you want to, when Mr. Lawrence takes the stand if you want to be interpreting for the victim that is fine.

THE INTERPRETER: Yes, Your Honor.

THE COURT: So he understands what is being said. That is fine.

MR. GARDNER: No objections.

THE COURT: No objection to the letter?

[103] MR. GARDNER: No, sir.

THE COURT: Then we will go ahead and have that received, and if you need to make copies for everybody's file.

Let's go ahead and take a five-minute recess and let me read the letter and then we will come back.

MS. KALIL: Yes, sir.

THE COURT: Let's take a five-minute recess.

(Discussion off record and recess.)

THE COURT: I have had a chance to review the letter. We will go ahead and have that filed.

Call your next witness.

MS. KALIL: Your Honor, I would call Kirkland Lawrence.

THE COURT: Mr. Lawrence, if you will come forward, please. Sir, if you will come around to this area here where you can be seated. And as best you can if you will raise your right hand to be sworn.

Do you swear or affirm that the testimony you are about to give in this cause will be the truth, the whole truth, and nothing but the truth so help you God?

THE DEFENDANT: Yes, sir.

[104] THE COURT: All right.

KIRKLAND GEORGE LAWRENCE,

having been produced and first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. KALIL:

Q Go ahead and state your full name.

A Kirkland George Lawrence.

Q Mr. Lawrence, we're here today for your sentencing hearing, and I want to ask you some just basic background questions before we actually talk about what you have entered a plea of guilty to. Were you born in Jacksonville?

A No.

Q Where were you born?

A Brooklyn, New York.

Q How long did you live in Brooklyn?

A Approximately three years.

Q Who were you raised by?

A My grandmama.

Q Your grandmother lives here in Jacksonville?

A Yes.

Q So you moved to Jacksonville around the age of three?

A Yes, ma'am.

[105] Q And you have a lot of family here in Jacksonville?

A Yes, ma'am.

Q Now, did you actually stay in Jacksonville for high school or did you go back up North for high school?

A I went back up North for high school.

Q Who did you stay with when you went to school up there?

A My brother.

Q How many brothers do you have?

A Four.

Q Did you actually graduate from high school?

A Yes, ma'am.

Q After high school graduation did you move back to Jacksonville?

A Yes, ma'am.

Q What were your plans when you moved back to Jacksonville after you graduated high school?

A Help my grandmama and get a job.

Q You were living with your grandmother at that time?

A Yes, ma'am.

Q Is your grandmother in poor health?

A Yes, ma'am.

Q So your plan was to try and get a job to assist [106] your grandmother?

A Yes, ma'am.

Q Mr. Lawrence, I want to refer back to the day that this robbery took place.

A Yes, ma'am.

Q Is there anything that you would like first of all to tell the victim in this case, Mr. Rodriguez?

A Yes, ma'am. I'm sorry for my behalf of doing wrong. I just want to tell him I'm sorry.

Q Mr. Lawrence, you have been arrested prior to this case, correct?

A Ma'am?

Q Prior to being arrested on this charge you had a few other arrests in your history, correct?

A Yes, ma'am.

Q They have all been pretty minor offenses?

A Yes, ma'am.

Q In fact I believe the only felony conviction you've had was for driving while license suspended; is that correct?

A Yes, ma'am.

Q What can you tell the Judge in your own words about why this happened or what you would like to tell him about your involvement?

A Well, I just got caught up doing something [107] wrong. Something I had to do. If I needed something, I could ask my grandmama for it, and she would have provided for me. I just like got caught up with something I had to do.

Q You admit you've really disappointed your grandmother; wouldn't you say that?

A Yes, ma'am.

Q She's provided for you and raised you your whole life?

A Yes, ma'am.

Q And like you said, if you needed something, you could have asked her for it; is that right?

A Yes, ma'am.

Q This was clearly a stupid mistake on your part?

A Yes, ma'am.

Q What can you tell the Judge about what it is you would like to do once you are released from prison? What sort of plans do you have?

A Getting a trade, learn a trade, get out. Probably start my own business and come out a better man. Come out a better man.

Q Mr. Lawrence, is there anything else you would like to tell the Court?

A I'm just sorry. I'm just sorry for what I did.

MS. KALIL: I don't have anything further, Your [108] Honor.

THE COURT: Any cross?

MR. GARDNER: Just briefly, Your Honor.

CROSS-EXAMINATION

BY MR. GARDNER:

Q Mr. Lawrence, is it fair today that you're admitting to committing the robbery of Mr. Rodriguez?

A Yes, sir.

Q When you initially talked to the police you denied it, didn't you?

A Yes, sir.

Q And even when you were talking to your family on the jail telephone calls, you also denied it, didn't you?

A Yes, sir.

Q In fact when you were interviewed by the corrections officer you denied it again; is that true?

A Yes, sir.

THE COURT: Go ahead and move a little closer to that mic because I want to hear you.

Q Was Mr. Graham there with you that night?

A Yes, sir.

Q Was Mr. Bailey?

A Yes, sir.

Q Who was the other person that was there or was [109] it just you three?

A Yes, sir.

Q Just three of you?

A Yes, sir.

Q Where did you get the guns from?

A Mine, I had bought mine.

Q Was Mr. Graham armed with a firearm also?

A No, sir.

Q He didn't have a gun?

A No, sir.

Q What about Mr. Bailey?

A Yes, sir.

Q When you guys were stopped at the hospital, they found three guns in the car?

A There was one gun stayed in the car.

Q And how old are you now?

A Twenty-one.

Q How old were you when you were arrested?

A Twenty.

Q The presentence investigation report indicates that prior to your arrest you hadn't had a job in over two years. Does that sound right?

A Yes, sir.

MR. GARDNER: I don't have any other questions, Your Honor.

[110] THE COURT: You see the gentleman sitting out there, Mr. Lawrence, the victim who testified earlier?

THE DEFENDANT: Yes, sir.

THE COURT: All right. I'm talking about that robbery. Did you see Mr. Graham with a gun during that robbery?

THE DEFENDANT: All of us all had guns on that robbery, sir.

THE COURT: So all of you had guns during the robbery of Mr. Rodriguez—

THE DEFENDANT: Yes, sir.

THE COURT: —the gentleman who is sitting out there in the audience?

THE DEFENDANT: Yes, sir.

THE COURT: So during the robbery of Mr. Rodriguez, you are saying that this gentleman over here, Mr. Graham, had a gun?

THE DEFENDANT: Yes, sir.

THE COURT: What kind of gun did he have?

THE DEFENDANT: An automatic.

THE COURT: All right. And where did he get that from, if you know?

THE DEFENDANT: I don't know where he got his gun from, sir.

[111] THE COURT: Where did you get yours from?

THE DEFENDANT: I bought it off the streets.

THE COURT: Do you have a name of who you bought it from?

THE DEFENDANT: A dude named Chris.

THE COURT: Chris. Do you know his last name?

THE DEFENDANT: No, sir.

THE COURT: What about Mr. Bailey, where did his gun come from?

THE DEFENDANT: I don't know where he got his gun from, sir.

THE COURT: So what was it you were talking about when you said that Mr. Graham didn't have a gun?

THE DEFENDANT: That was the other altercation where the dude that my cousin had got into it at the club with.

MR. GARDNER: I think he is referring to the one that happened later on that evening.

Is that right?

THE DEFENDANT: Yes, sir.

THE COURT: All right. But in terms of the robbery involving Mr. Rodriguez, Mr. Graham had a gun—

[112] THE DEFENDANT: Yes, sir.

THE COURT: —during that robbery?

THE DEFENDANT: Yes, sir.

THE COURT: And what was Mr. Graham telling you all during that robbery?

THE DEFENDANT: Everybody was doing their own thing.

THE COURT: There were words that Mr. Rodriguez said were being spoken by Mr. Graham. What were the words?

THE DEFENDANT: "Where it's at? Where the money at . . . "

THE COURT: Speak up.

THE DEFENDANT: "Where the money at? Where the money at?" That's all we was asking for.

THE COURT: Well, obviously, Mr. Rodriguez couldn't understand that. He doesn't speak English. So who was Mr. Graham talking to?

THE DEFENDANT: He was talking to him. I had—his other friend was in the living room with me.

THE COURT: All right. And his friend in the living room could speak English?

THE DEFENDANT: Yes. I think so. He said he didn't speak English at the time.

THE COURT: All right. How did this plan [113] originate to go into Mr. Rodriguez' apartment or place of living?

THE DEFENDANT: It was something that came at the time.

THE COURT: Well, tell me about that.

THE DEFENDANT: Everybody had needed money, so it was like . . .

THE COURT: Mr. Lawrence, you need to focus and tell me what happened. How did it get planned? This is your opportunity to convince the Court what your sentence should be.

THE DEFENDANT: It was just a thing that we planned at the last minute. It was like everybody needed money so we just was standing there waiting.

THE COURT: Well, how was Mr. Rodriguez targeted for this robbery?

THE DEFENDANT: Well, we seen him like going in the house with groceries one day.

THE COURT: Who is "we"?

THE DEFENDANT: Me and another dude.

THE COURT: And what was his name?

THE DEFENDANT: Louis.

THE COURT: Louis what?

THE DEFENDANT: Louis Wingard.

THE COURT: Louis Wingard?

[114] THE DEFENDANT: Yes.

THE COURT: And how long before the robbery did you and Mr. Wingard see Mr. Rodriguez going into an apartment with groceries?

THE DEFENDANT: Like about a week.

THE COURT: All right. And then what happened from there?

THE DEFENDANT: Everybody needed money and I—

THE COURT: Who is "everybody?"

THE DEFENDANT: Me, my cousin, and Graham.

THE COURT: And when you say your cousin, who is that?

THE DEFENDANT: Bailey.

THE COURT: Who?

THE DEFENDANT: Bailey.

THE COURT: Bailey.

THE DEFENDANT: Meigo.

THE COURT: Meigo Bailey?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And how did the three of you all get together to do this?

THE DEFENDANT: I got a ride from my grandma's house. We met up on Burt Road, and we rode around there and did it.

THE COURT: Well, there had to be some [115] discussion before you did this. That is what I'm getting at. Tell me about that.

THE DEFENDANT: Basically we—I was like, I think I know somebody who has got some money. And we went around there, knocked on the door, and they opened the door.

THE COURT: All right. So you told Mr. Bailey and Mr. Graham; is that right?

THE DEFENDANT: Yes, sir.

THE COURT: And so from that how did the plan get formulated to rob Mr. Rodriguez?

THE DEFENDANT: One person knocked on the door.

THE COURT: Did you all have a discussion how you were going to do the robbery?

THE DEFENDANT: No. We just did it.

THE COURT: You just did it?

THE DEFENDANT: Yes, sir.

THE COURT: So there was no plan?

THE DEFENDANT: No. We just did it.

THE COURT: Okay.

THE DEFENDANT: No plan. One person knocked on the door. They opened the door, and we went in there and asked for the money. It was like they had no money so we left.

THE COURT: Well, what was the purpose of [116] putting Mr. Rodriguez in the—I think you said a closet?

MR. GARDNER: Yes, sir.

THE DEFENDANT: So he couldn't get to the phone.

THE COURT: And whose idea was that?

THE DEFENDANT: I had left at—I was the first one out of the house, so I don't really even know. I was the first one out of the house.

THE COURT: So you didn't see that?

THE DEFENDANT: No. I was the first one to leave.

THE COURT: Based on the Court's questions, is there any further direct?

MS. KALIL: No, Your Honor.

THE COURT: Cross-examination from the state?

MR. GARDNER: Just briefly.

THE COURT: And then we'll go to cross-examination of Mr. Gregory.

MR. GREGORY: Thank you, Your Honor.

CROSS-EXAMINATION CONTINUED

BY MR. GARDNER:

Q Mr. Lawrence, who had the .380?

A The .380?

Q Yes, sir.

[117] A Revolver?

Q No, no, semiautomatic, the .380.

A Bailey. I think Bailey had that.

Q Bailey had the .380?

A Yes.

MR. GARDNER: May I approach the witness, Judge?

THE COURT: Yes.

MR. GARDNER: May I approach the witness, Your Honor?

THE COURT: Yes.

MR. GARDNER: Do I need to have these premarked?

THE COURT: I don't know what you are going to use them for.

MR. GARDNER: I'm not going to introduce them. I just want to ask him whose was whose.

Actually, I'll go ahead and can I get these premarked, Madam Clerk?

Your Honor, I can just write on them to speed things along and identify them as A, B, and C if that is okay.

THE COURT: That is fine. Just put it in a position where she can put the labels on later.

MR. GARDNER: May I approach the witness, Your [118] Honor?

THE COURT: Yes.

BY MR. GARDNER:

Q Mr. Lawrence, I am going to show you three pictures of the guns that were recovered out of Mr. Graham's car. This is the .40 caliber, I believe. This is the .40. This it [sic] the .380, and this is the revolver. Can you tell the Court which gun you had?

A That one (indicating).

Q The .40?

THE COURT: Are you talking about the robbery of Mr. Rodriguez?

MR. GARDNER: Yes, sir.

THE COURT: All right.

BY MR. GARDNER:

Q You had the .40 caliber?

THE COURT: So what number are you pointing to?

MR. GARDNER: It's state's A.

THE COURT: State's A.

Is that right, Mr. Lawrence?

THE DEFENDANT: Yes, sir.

THE COURT: So that was the gun you used?

THE DEFENDANT: Yes, sir.

BY MR. GARDNER:

Q Was it loaded?

[119] A Yes, sir.

Q You had one in the chamber?

A Yes, sir.

Q And then you're saying Mr. Bailey had the .380, which is pictured in State's B?

A Yes, sir.

Q Was that his gun?

A I ain't sure. I ain't sure.

Q And then you're saying Mr. Graham had the revolver?

A Yes, sir.

Q And that would be State's C?

A Yes, sir.

Q Do you know whether or not their guns were loaded?

A No, sir.

Q Now, when you say you left the apartment first, you left Mr. Bailey and Mr. Graham inside?

A Yes, sir.

Q And you don't know what they did after that?

A (Shakes head negatively.)

Q Is that a no?

A Yes, sir.

THE COURT: Let's go ahead and tender those to the clerk.

[120] MR. GARDNER: I'd like . . . . . state's A, B, and C.

If there is no objection, I'd like to put them into evidence.

MS. KALIL: There is no objection.

THE COURT: All right. Then they will be received as State's—A will be 1, B will be 2, and C, as in Charlie, will be three.

(State's Exhibits Nos. 1, 2 and 3 were received in evidence.)

MR. GARDNER: May I proceed?

THE COURT: Yes.

BY MR. GARDNER:

Q What did you guys talk about after you got back in the car?

A We were riding. We rode, and then we seen the dude who my cousin had got into it with at the club.

Q I mean I was talking about did you guys talk about the robbery and what had happened?

A Yes.

Q What did you guys say?

A Well, it wasn't nothing. It was nothing.

Q Basically it was there wasn't anything there; you didn't get any money?

A No.

[121] MR. GARDNER: All right. I don't have any other questions, Your Honor.

THE COURT: All right, any cross?

MR. GREGORY: Yes, Your Honor. Just a moment, please, Your Honor.

THE COURT: Sure. Take your time.

(Mr. Gregory confers with Mr. Graham.)

MR. GREGORY: May it please the Court?

THE COURT: Yes.

MR. GREGORY: May I see the exhibits? Are they here?

THE COURT: They should be up with the clerk.

(Mr. Gregory examines the State's Exhibits Nos. 1, 2, and 3 with Mr. Graham.)

CROSS-EXAMINATION

BY MR. GREGORY:

Q Good afternoon, sir.

A Sir?

Q I said good afternoon.

A Good afternoon.

Q I didn't hear you say who knocked on the door. I heard you say we knocked on the door or we went in. Who actually was the person knocking on the door of Mr. Rodriguez' residence?

A I was behind everybody so I couldn't really [122] tell you that.

Q You don't know who went in first?

A No. I was the last one in.

Q And no guns were drawn at that point, correct?

A No, sir.

THE COURT: At what point, Counsel?

Q At the point that you entered, that you three entered the residence of Mr. Rodriguez.

A The gun was drawn afterwards.

Q At what point afterwards?

A As soon as we stepped—as soon as I stepped in the house I had pulled mine.

Q You had pulled your gun?

A Yes, sir.

Q So you can't say whether the other two were pulled; you can only tell the Court when you pulled your gun; isn't that correct?

A Yes, sir.

Q Now, this robbery happened in about—I didn't hear you say this, but this robbery happened about 7:00 p.m.; is that correct?

A I couldn't recall the time.

Q You have no recollection of the time at all?

A I know it was late, probably about 7:00, 7:30-8:00, probably around that time. It was the [123] nighttime.

Q You didn't have a watch on?

A No, sir.

Q You didn't have occasion to look at the report to see what the report said occurred and at what time?

A On the first report, on the police report it said 8:00, around 8:00-8:30, the first report I had got.

THE COURT: And, Mr. Lawrence, don't worry about what the police reports are saying. Tell us what you remember.

THE DEFENDANT: I know it was late, probably about 8:30, probably about 8:30, almost 9:00.

BY MR. GREGORY:

Q And so you are saying now it didn't happen about 7:00-7:30? Are you sure it happened at 8:30, or are you just guessing sometime between 7:00 and 9:00?

A I'm just guessing. I ain't sure.

Q Now, you or Mr. Bailey actually called Mr. Graham at about 8:00, correct?

A Probably. I ain't sure.

Q And either you or Bailey called Graham asking him to get in his father's car and come by and get you guys, correct?

A I didn't call Graham.

Q Sorry?

[124] A I did not call Graham.

Q But Bailey called Graham in your presence; is that correct?

A Yes. Not in my presence. I met them over on Burt Road.

Q And that was after the Rodriguez robbery or before the Rodriguez robbery?

A It was before.

Q Now, you told officers at the correctional facility that you didn't do any of this, correct?

A Yes, sir.

Q And you told police officers you didn't do any of this, correct?

A Yes, sir.

Q And according to the PSI officer, you told the PSI officer that you didn't know anything, you had no knowledge of anything; is that correct?

A Yes, sir.

Q And you had also told Mr. Graham that you were going to tell the Court that Mr. Wingard was the one who actually was the person involved, correct?

A No, sir.

Q In fact didn't you tell Mr. Graham that you were going to tell the Court that he was not present because he wasn't present?

[125] A Nor sir.

Q You never talked to Mr. Graham at all about this since you've been in jail?

A No, sir.

Q Not one conversation?

A No, sir.

MR. GREGORY: No other questions, Your Honor.

THE COURT: All right. Anything else for Mr. Lawrence?

MS. KALIL: Nothing further, Your Honor.

MR. GARDNER: No, sir.

THE COURT: All right. So just so we are clear, Mr. Lawrence, as to Mr. Rodriguez' robbery where Mr. Rodriguez, the gentleman out here in the audience; was the victim, you are saying that Mr. Graham was there with you and he had a gun in his hand?

THE DEFENDANT: Yes, sir.

THE COURT: And he participated in the robbery?

THE DEFENDANT: Yes, sir.

MR. GARDNER: I do have a couple of quick questions, Your Honor, if that is okay.

THE COURT: All right.

MR. GARDNER: Just briefly.

RECROSS-EXAMINATION

[126] BY MR. GARDNER:

Q Mr. Lawrence, Mr. Graham is the one that provided the vehicle; is that right?

A Yes, sir.

Q Did you know that he was on probation?

A Yes, sir.

Q Did you know that he had to be home before his curfew?

A Yes, sir.

Q So he drove you to the location, right?

A Yes, sir.

Q And you don't know whether he was the first one in or not, right?

A No, sir.

Q But then he drove you away from the location?

A Yes, sir.

MR. GARDNER: All right. I don't have any other questions, Your Honor.

THE COURT: All right. Anything else?

MR. GREGORY: No, sir.

THE COURT: Anything else?

MS. KALIL: No, Your Honor.

THE COURT: Go ahead and retake your seat, sir.

(The defendant resumes his seat at counsel table.)

[127] THE COURT: Any other witnesses for Mr. Lawrence?

MS. KALIL: No other witnesses, Your Honor.

THE COURT: All right, then let me hear arguments if you are ready.

MR. GREGORY: Your Honor, Mr. Graham is not going to call any witnesses further so whenever you want to proceed at this point he is not calling any more witnesses.

THE COURT: Okay.

MR. GARDNER: May I proceed, Your Honor?

THE COURT: Sure.

MR. GARDNER: Your Honor, I'll be brief. I think you've had the opportunity to hear a lot of facts about this particular crime during the VOP hearing on Mr. Graham so you are well aware of what happened that night. It was a very serious offense. It was the first time that we actually heard and confirmed what these detectives knew, that Mr. Rodriguez was being targeted because he was Hispanic. This was a planned and premeditated act where they had actually gone to where he was at and targeted him, a person that you heard had only been in this country a month or two who had to flee his

country because of a war. He comes to this country [128] with his wife and his stepson, and he becomes a productive member of our community.

And a month or two after he has been here someone unbeknownst to him is targeting him. Then when he hears the knock on his door, when he opens the door his testimony is Mr. Graham is the first one in with a firearm in his house. It is the last thing he expected when he came to the United States.

They ransacked his house, and he told you this defendant had a firearm and he pointed it at him. This defendant admitted that he was fully involved in this case. It's a very, very serious crime. It's not as if it is just a robbery on the street, but they entered his home, a place that he should have felt safe and fortunately his family wasn't there.

I think the Court should consider that the defendant has been arrested, I believe, approximately eight times. Although, many of them have been dropped, a few he did have some depositions [sic] on them, so he has had a few second chances.

While he did receive his high school diploma, he hasn't had a job in two years. His reason for going and committing this robbery is because—

[129] THE COURT: Let me stop you because I'm only showing the—I see the arrest, but I'm only showing the felony conviction for, as Ms. Kalil pointed out, I believe it was driving while license suspended or revoked.

MR. GARDNER: I think that is actually a misdemeanor.

THE COURT: Oh, is that a misdemeanor?

MR. GARDNER: Yes. I mean there were some other dispositions on some other arrests, Your Honor.

THE COURT: And where are the felony convictions?

MR. GARDNER: I don't believe he has one. I'm showing a withhold, Your Honor, on a possession of cocaine.

THE COURT: Back in 2003 it looks like or '04?

MR. GARDNER: Yes, sir, where he got 60 days time served it looks like on a withhold.

THE COURT: All right.

MR. GARDNER: So he has had several run-ins with the law. He hasn't been employed by his own admission in two years, and he said that they needed money and that is why they committed this robbery. Unfortunately, that is what brings us here today.

[130] Your Honor, this was a very serious act. It is lucky someone didn't get shot or killed. And we would ask you to sentence the defendant to the maximum sentencing range, which would be 15 years in the Florida State Prison.

THE COURT: All right, let me hear from the defense.

MS. KALIL: Your Honor, you had a chance to hear about Mr. Lawrence's background in terms of the fact that he was born in Brooklyn. However, he was essentially abandoned by his family, and his grandmother Gloria Wickham raised him.

Mr. Lawrence's case has been pending since December of 2004, and we have had several court dates. Ms. Wickham has been to every single court date except for today's because she indicated that it would be too emotional for her to be present in court this morning while her grandson was sentenced.

Your Honor, Mr. Lawrence said it best, if he needed anything, he could have asked his grandmother. He didn't need to commit this robbery. He admits it is a very serious crime. Even though he has been arrested on a few occasions, as the state indicated, most of those have been dropped. The one cocaine possession arrest in 2003 he [131] received a withhold of adjudication and 60 days. That is the most time prior to this case that he had spent in jail with 60 days in the Duval County Jail. He has already been in jail now for almost a year and a half on this case.

Your Honor, Mr. Lawrence is a young man. He is the first one in the group of these codefendants to enter a plea of guilty to these charges or to the count 1, at least, attempted armed robbery.

Your Honor, the 10 years is the 10-year minimum mandatory which is day for day, and at his age, obviously, that is a very severe sentence and one that he has to suffer the consequences for his actions. However, I would just ask that you consider the lower range that he has pled to to give him an opportunity to get out while he is still relatively young so that hopefully he can try and make his life better than what he has done up to this point.

THE COURT: Anything else from either side?

MR. GARDNER: No, sir, Your Honor.

THE COURT: All right. Mr. Lawrence, go ahead and have a seat back in the holding cell, and let me deal with Mr. Graham's case, and then I will bring Mr. Lawrence back out.

[132] (Mr. Lawrence exits courtroom. Mr. Graham is still present.)

THE COURT: Show Mr. Graham is before the Court. I have placed Mr. Lawrence in the back. And we are here for sentencing on Mr. Graham.

MR. GREGORY: Yes, sir.

THE COURT: Is there anything else that either side wants to present?

MR. GARDNER: As far as evidence, Your Honor?

THE COURT: Yes.

MR. GARDNER: No, sir. I think Mr. Rodriguez' testimony today was all we wanted to have as the last bit for the state.

THE COURT: Did the defense, Mr. Gregory, did you have sufficient—I know that we brought Mr. Graham out right after Mr. Rodriguez had been sworn in.

MR. GREGORY: Yes, sir.

THE COURT: Was there any other questions that you wanted to ask Mr. Rodriguez before we go forward with sentencing?

MR. GREGORY: No, sir.

THE COURT: Are there any other witnesses that you want to have for Mr. Graham?

MR. GREGORY: No, sir. And this is after [133] discussing it with my client.

THE COURT: Is that right, Mr. Graham?

MR. GREGORY: All of my answers are after discussing it with him.

THE COURT: Sure.

THE DEFENDANT: No, sir.

THE COURT: There were no other witnesses that you wanted to have testify on your behalf?

THE DEFENDANT: No, sir.

THE COURT: All right.

MR. GREGORY: Keep your voice up, please, sir.

THE COURT: And, Mr. Graham, is there anything that you want to say to the Court before I impose sentence?

THE DEFENDANT: I wrote a letter I would like to read to you.

THE COURT: Go ahead. And if you would direct the speaker towards him a little bit—the mic towards him a little bit to pick him up a little bit easier. Madam Clerk, direct it towards him.

THE DEFENDANT: As a result of this violation I have learned how to be a better person in life. Before . . . . . citizen and society was, but due to my incarceration I learned that being a good person is not only thinking of others, but yourself as well as [134] your well-being.

I now know that I have to look at the big picture in life before I make any move or decision because the wrong decision can cause you your life.

While incarcerated I have had an ample amount of time to think about how I am going to improve my life. First I am going to further my education. As you can see, I have tried to proceed in my schooling, but due to the circumstances I was unable to focus clearly.

Secondly, I am going to seek full-time employment to use my time wisely and make sure my

chance of being put [b]ack in the same position I am currently in are abated. Once employed I am going to . . . . . me a direct deposit bank account and assist my mother with these outstanding bills. That would take a load off her shoulders. My mother is going through foreclosure on two houses. One is with our house built from the ground up where I share so many memories.

This whole situation really puts a strain on my mother. She now works 12 hours a day and is living from check to check trying to make ends meet. And now being incarcerated just adds extra stress. I know she doesn't deserve that, nor nobody does.

[135] While employed, in my free time I would like to be a public speaker to reach out to the youth, to let them know that jail is no place where they are going to be and how I had to suffer for 17 months day for day missing my family, friends, and loved ones.

I have been looking to start my own barber shop business. After receiving my GED I am going to enroll into barber school which would take approximately eight weeks to receive my certificate. My mother said there were a couple of vacant buildings where I can start up in Georgia where she now resides.

I have younger siblings, nieces, and nephews who look up to me, and I play a major role in their life, so I need to be there to help them excel in positive activities such as sports and schooling.

The more I talk to my family and they tell me how my younger family members ask where I am, I have come to grips that these children need me, and I need to be there to nurture their love and care for them.

I now know that life may not always be fair, but I can never allow the pains, hurdles, and handicaps of the moment to poison my attitude and [136] plans for myself and my future.

Your Honor, I do ask for a second chance.

THE COURT: All right.

(Mr. Gregory confers with Mr. Graham.)

MR. GREGORY: I asked my client if he would like this letter to be filed. He said yes. With your permission I will tender it to the clerk.

THE COURT: We will go ahead and make that a part of his file.

MR. GREGORY: May I?

THE COURT: Yes.

DIRECT EXAMINATION CONTINUED

BY MR. GREGORY:

Q Mr. Graham, you had the clear ability to hear and you did hear everything that was said during the testimony today, correct?

A Yes, sir.

Q And a moment ago on the side—and I will say it in open court—I advised you that this is your opportunity to respond or to say or speak to whatever you want to, and this is really your last opportunity. Do you understand that?

A Yes, sir.

Q And we discussed that?

A Yes, sir.

[137] Q You heard the testimony of a variety of witnesses, particularly Mr. Rodriguez and the last witness, of course, Mr. Kirkland, Kirkland Lawrence, a codefendant in this case. Is there anything more beyond what you have already said that you would like to tell the Court now as to Rodriguez, as to Kirkland Lawrence, as to any other matter? This is your chance. I am not and no one is restricting you from saying whatever you want to say or forcing you to say anything if you don't want to. This is your chance. You still have a pending case, but this is your chance to speak if you want to.

A Yes, sir.

Q Do you understand that, sir?

A Yes, sir.

Q With that in mind since you are here on this sentencing on the violation of probation part only, do you understand that also?

A Yes, sir.

Q The Court has already found a violation. What do you have to say, if anything, at this time, sir?

A To Mr. Rodriguez I would like to say I'm sorry for what happened to him, but like I said once before, Your Honor, I had no involvement in the robbery.

Q Is there anything else you want to say to Mr. Rodriguez, testimony?

[138] A No, sir.

Q What about the testimony of Kirkland Lawrence? You heard him say that you were there and you were armed, you were involved in discussions about getting some money, everyone needed money. What do you have to say to that, if you have anything to say at all?

A (Inaudible.)

Q And you need to speak up if you want to say something so the Court can hear you and the court reporter can take it down. What do you have to say to Mr. Kirkland Lawrence's testimony? He is not here. He is in the back.

A I don't know why Kirkland put my name in it, Your Honor. Like I said, I had nothing to do with it, and I'm very sorry that his family has got to go through what they are going through right now. And he is facing all of this time, Your Honor, but I don't know why my name has been brought up into this.

Q Did you ever talk to him in the jail since you two were under arrest for these charges?

A Yes, sir.

Q How many times have you talked to him if more than once?

A I don't recall, but I remember once.

Q What did he say when he spoke to you? You [139] heard him say he never spoke to you in jail. What did he say to you?

A He said he was going to tell the truth.

Q Well, what did he tell you the truth was that he was going to tell the Court?

A That him and Wingard did it.

Q Is that Louis Wingard?

A Yes, sir.

Q Did he tell you anything about what he was going to say about you being or not being involved in this situation?

A Yes, sir.

Q What did he tell you?

A He said he was going to tell the Court that I had nothing to do it with it, which I didn't.

Q Now, is there anything else that you wanted to tell the Court?

A No, sir.

MR. GREGORY: That concludes what he wants to say to the Court, and I'm prepared to speak and the state, but I'll defer to the state first if they are going to speak first. Whatever you want to do, Your Honor.

THE COURT: Let me hear from the state first.

MR. GARDNER: And, Judge, am I entitled to ask [140] him any questions?

THE COURT: You can ask the questions as to his last statements, yes.

MR. GARDNER: Okay. And also as to his letter that he read to the Court?

THE COURT: Yes.

CROSS-EXAMINATION

BY MR. GARDNER:

Q Mr. Graham, you remember when you originally were charged with the underlying probation case you wrote a letter to the Judge back then? I believe it was Judge Dearing. Do you remember that?

A Yes, sir.

Q Do you remember telling the Judge at that time in that letter that "I'd like to tell you that this is my first and last time getting in trouble"? Do you remember telling the Judge that in your letter?

A Yes, sir.

Q Do you remember in that letter you also wrote to Judge Dearing, "I am a follower of the Lord now, and I believe in doing right." Do you remember making that statement?

A Yes, sir.

Q Do you remember in that letter you also said, "I've decided to turn my life around." Do you remember [141] that statement?

A Yes, sir.

Q Do you remember making the statement in the letter that, "I made a promise to God and myself that if I get a second chance, I'm going to do whatever it takes to get to the NFL." Do you remember that?

A Yes, sir.

Q Do you remember making this statement: "I will never get back into any trouble because this time away from my family has been so hard. Sometimes I think about giving up." Do you remember that?

A Yes, sir.

Q And do remember last writing to Judge Dearing, "I'm not going to get into any more trouble." Do you remember that?

A Yes, sir.

Q You didn't keep that agreement with Judge Dearing, did you?

A No, sir.

Q Now, it is your testimony to the Court today that you had no involvement in the robbery of Mr. Rodriguez; is that right?

A Yes, sir.

Q Even though he remembered you and pointed you out on the stand, correct?

[142] A Yes, sir.

Q He's mistaken, right?

A Yes, sir.

Q And Detective Kee was mistaken when he told the Court during the testimony during your hearing that you admitted to him that you committed this robbery. He's mistaken also?

A Yes, sir.

Q Now, those three guns that were in your car, where did they come from?

A I wouldn't know. I didn't have them. I wouldn't know.

Q You don't know?

A No, sir.

Q . . . there were some exhibits introduced during the hearing. Actually, I can use—well, actually, during the actual hearing, I believe in the VOP hearing.

THE COURT: I believe according to my notes I said that the photos of the firearms in the car were not considered.

MR. GARDNER: Okay.

THE COURT: According to what I show in my notes.

MR. GREGORY: That is what I recall.

BY MR. GARDNER:

[143] Q So you have no idea where those three guns that were in your car came from?

A No, sir.

Q Even though one was found right in the driver's seat where you were were sitting, you don't know where it came from?

A No, sir.

Q The police planted it in there?

A To my knowledge there wasn't no guns in there.

Q Well, you admit you fled from the police, correct?

A Yes, sir.

Q In the black Cadillac, right?

A Yes, sir.

Q And then you got in a wreck, right?

A Yes, sir.

Q And from the time that you fled from the hospital all of the way up until the time that you wrecked, no one else was in the car with you; is that right?

A No, sir.

MR. GARDNER: If I could have this marked, Your Honor, as State's C.

THE COURT: Well, I think it would be D.

MR. GARDNER: D, yes. I'm sorry.

[144] THE COURT: D as in Delta.

MR. GARDNER: And then E.

THE COURT: E as in Echo.

MR. GARDNER: And then F.

THE COURT: F as in Fox Trot.

MR. GREGORY: Are these marked for identification or . . .

MR. GARDNER: Just for identification only, Your Honor. I just want to question him about them.

BY MR. GARDNER:

Q I want to show you State's F first. That's your dad's black Cadillac, right?

A Yes, sir.

Q That's the car you were driving that night, right?

A Yes, sir.

Q That's the passenger floorboard of his car, isn't it?

A Yes, sir.

Q Whose gun is that?

A I don't know.

Q You don't know how that got there?

A No, sir. I don't remember seeing that gun.

Q I'm going to show you the driver's seat. The air bag deployed when you hit the concrete pole, didn't [145] it?

A Yes, sir.

Q Before you got out and ran, right?

A Yes, sir.

Q The .380 and the .38 in the driver's seat, you have no idea where those came from?

A No, sir.

Q You weren't sitting on those whenever you got out of the car?

A No, sir.

MR. GARDNER: I don't have any other questions, Your Honor.

THE COURT: Any redirect?

MR. GREGORY: And just for the record, those were for identification only?

MR. GARDNER: Yes. I will take those back actually.

MR. GREGORY: No, Your Honor.

THE COURT: Let me go ahead and hear the rest of the arguments then if there is no further cross-examination.

MR. GARDNER: No, sir, Your Honor.

THE COURT: And there is no further testimony from either side?

MR. GREGORY: No, sir.

[146] THE COURT: And, Mr. Graham, you don't have anything else you want to say to the Court?

THE DEFENDANT: No, sir.

THE COURT: Then let me hear arguments from the state, and I will come back to the defense.

MR. GREGORY: Yes, sir.

MR. GARDNER: Your Honor, just to begin with the defendant was on probation for a very serious crime, a burglary with an assault, which is a

first-degree felony punishable by up to life in prison and an attempted armed robbery with a weapon, which is a second-degree felony punishable up to 15 years. The defendant was on probation—actually, I believe he was direct filed as a juvenile and brought into an adult court because of the seriousness of those charges.

At that point it should have been a wake-up call for Mr. Graham as to what this type of behavior could do to him. I think it is important to note that I believe one year after he entered his plea, less than one year from his plea and six months from the time that he got released from his jail sentence on his VOP case the defendant goes out and commits this new serious offense all while under the supervision of the department of corrections.

[147] The defendant's letter to the Court back then, the same thing he's telling the Court today is I need a second chance, I'm not going to get in any trouble. And what is striking is that the defendant will admit to fleeing from the police, but as to his initial statements to the Court it was because he said he had to get home for his curfew.

And the fact that these firearms were found in his car and he has no idea how they get there and then one of his codefendants who finally comes around the corner today and lays it all out there for the Court that, yes, he did this and he was with me, and the fact that Mr. Rodriguez identified him clearly shows that he was involved in this, and satisfied the

consciousness of the Court by a greater weight of the evidence that he was.

I think it is also an important point to note that Mr. Rodriguez, how he tells the Court that, yes, this has affected me, I was terrified, I thought they were going to hurt me, but then he speaks out and says, I fee[l] sorry for their families that they have to go through this.

Mr. Rodriguez was a productive member of this society. Once again, you heard today how they were targeted out. And it's his testimony, not by words, [148] but by actions, and it's the state's position that actions speak a lot louder than words that this defendant was the first one in the door with the gun pointed in his chest, and when this defendant was speaking, the others were acting.

In addition, this defendant is the one who cocked the gun and pointed it at Mr. Rodriguez' head and put him in a closet. That is very egregious, and I think that separates Mr. Graham from Mr. Lawrence's participation.

Your Honor, just to cut it short, this defendant was on probation for a very serious crime. I don't believe Mr. Bailey or Mr. Graham—or Mr. Lawrence were on probation when they committed these offenses. The defendant's statements to the Court then and the statements to the Court now that he was going to turn his life around, Your Honor, the only thing he has shown is an escalating pattern of criminal activity.

It's the state's position that this defendant should be punished, that he is incapable of rehabilitation because he was given an opportunity to do so on probation and he failed, and we would ask the Court to sentence him on a violation of probation as to count 1 to 30 years in the Florida [149] State Prison, and to the maximum sentence of 15 years on count 2.

THE COURT: What are the guidelines as to count 1?

MR. GARDNER: Sixty months, Your Honor, up to life.

THE COURT: All right, let me hear from the defense.

MR. GREGORY: Your Honor, you have heard a number of days of testimony, argument, and the rest, on Mr. Graham's behalf, a 19-year-old young man. He made a mistake. He was placed on probation. He is in violation of his probation. He has acknowledged and admitted to his fleeing and eluding. He has maintained his innocence. He entered a plea of not guilty as to the substantive charges. We have heard the testimony on more than one occasion now from Mr. Rodriguez, and we have now heard testimony from Mr. Kirkland Lawrence.

And as to Mr. Lawrence, of course, he appeared before you as a person who has acknowledged that he has given more than one statement, and they have been inherently inconsistent and contradictory.

THE COURT: But you would agree that this is the first time, I believe, he has testified before [150] the Court?

MR. GREGORY: That is correct. To the best of my knowledge the first time he has testified before any Court, with the exception of whatever he may have said at a bond hearing, if anything. That is correct.

So I cannot, and I am not standing here now and telling you that this is the—that he has been under oath on more than one occasion. I know he has been under oath today, but I don't know if he was under oath when he spoke to the PSI officer or to the corrections officer or JSO or whoever else or to a bond hearing Court.

But I do know that in terms of factual statements he has acknowledged that he—and denied any involvement, any guilt when interviewed, but then today he is speaking within a 10- to 15-year sentencing range, and we submit that he has the motive to go forward and speak as he did. And you heard Mr. Graham say that he did have occasion to talk to Mr. Lawrence in the jail, and he advised the Court what occurred during that discussion. Mr. Lawrence, of course, denied having such a discussion.

Mr. Graham . . . . . you've heard from his family. [151] They have spoke on his behalf. He is facing 60 months to a life sentence. I would ask for the minimum of five years, which is 60 months. I'm not going to stand here and tell Your Honor that I expect

you to do that or not expect you to do that. I don't expect anything other than you will be fair, as you always be will, and I will on his behalf enter that plea to you.

I have picked up Mr. Graham. I have on more than one occasion argued with Mr. Graham as to what happened, what did not happen. I have given him every opportunity to speak to the Court or PSI officer or do what he—or say what occurred, and he has advised me that he is speaking for what he understands to be true, so I have to stand by that as his representative.

I would, however, ask the Court not to impose a 30-year sentence for him for his part in the situation as the Court has found based on the violation of probation.

THE COURT: All right. Anything else from either side then?

MR. GREGORY: No, sir.

MR. GARDNER: No, sir, Your Honor.

THE COURT: Mr. Graham, before I take a brief [152] recess, is there anything else you want to say to me?

THE DEFENDANT: I want to let you know that I was being compliant on my probation.

THE COURT: You what?

THE DEFENDANT: That I was being compliant on my probation. I was doing what I was supposed to do on probation before this happened.

THE COURT: Before you committed a crime?

THE DEFENDANT: Yes, sir.

THE COURT: Well, you understand how that doesn't really make sense? Being compliant on your probation is not committing any crimes. It is not just doing all of the other things you were supposed to do. It's not committing any crimes. That is probably the biggest no no of being on probation is committing a crime.

THE DEFENDANT: Yes, sir.

THE COURT: Anything else you want to say?

THE DEFENDANT: No, sir.

THE COURT: Let's take a five minute recess and I will come out and pronounce sentence.

(Discussion off record and recess.)

MR. GREGORY: Your Honor, may I approach the side bar on an unrelated matter?

[153] THE COURT: All right.

(Side bar, Court and counsel.)

MR. GREGORY: Your Honor, for the record I just told my client I just spoke with the Court about an unrelated matter.

THE COURT: Mr. Graham, that was regarding another case that he is handling for another client.

THE DEFENDANT: Yes, sir.

THE COURT: It had nothing to do with your case.

MR. GREGORY: Thank you, sir.

THE COURT: Is there anything else from either side?

MR. GARDNER: No, sir.

MR. GREGORY: No, sir.

THE COURT: Mr. Graham, as I look back on your case, yours is really candidly a sad situation. You had, as far as I can tell, you have quite a family structure. You had a lot of people who wanted to try and help you get your life turned around including the court system, and you had a judge who took the step to try and give you direction through his probation order to give you a chance to get back onto track. And at the time you seemed through your letters that that is exactly what you wanted to do. [154] And I don't know why it is that you threw your life away. I don't know why.

But you did, and that is what is so sad about this today is that you have actually been given a chance to get through this, the original charge, which were very serious charges to begin with. The burglary with assault charge is an extremely serious charge. The attempted robbery with a weapon was a very serious charge.

And what was the original sentence again?

MR. GARDNER: Your Honor, he pled guilty—my file is showing back on December 18th of 2003 to counts 1 and 2 for a withhold and three years probation with a special condition of 12 months in jail, all of the juvenile sanctions that our office normally imposes and the court costs.

THE COURT: And you get that opportunity and you throw it away.

And how old are you now?

THE DEFENDANT: Nineteen.

THE COURT: And how old were you when this started?

THE DEFENDANT: Seventeen.

THE COURT: And in less than two years—actually, a lot less than that, in a very short [155] period of time you were back before the Court on a violation of this probation, and then here you are two years later standing before me, literally the—facing a life sentence as to—up to life as to count 1 and up to 15 years as to count 2.

And I don't understand why you would be given such a great opportunity to do something with your life and why you would throw it away. The only thing that I can rationalize is that you decided that this is how you were going to lead your life and that there is nothing that we can do for you. And as the state pointed out, that this is an escalating pattern of criminal conduct on your part and that we can't help you any further. We can't do anything to deter you. This is the way you are going to lead your life, and I don't know why you are going to. You've made that decision. I have no idea. But, evidently, that is what you decided to do.

So then it becomes a focus, if I can't do anything to help you, if I can't do anything to get you back on the right path, then I have to start focusing on the community and trying to protect the community from your actions. And, unfortunately, that is where we are today is I don't see where I [156] can do anything to help you any further. You've evidently decided this is the direction you're going to take in life, and it's unfortunate that you made that choice.

I have reviewed the statute. I don't see where any further juvenile sanctions would be appropriate. I don't see where any youthful offender sanctions would be appropriate. Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try and protect the community from your actions.

There was a withhold on counts 1 and 2 I show; is that right?

MR. GARDNER: Yes, sir, Your Honor.

THE COURT: Madam Clerk, what is his credit time?

THE CLERK: In his 2003 case he has 12 months and 496 days.

THE COURT: Say that again.

THE CLERK: Twelve months from his previous sentence and 496 days credit.

THE COURT: And that would be on counts 1 and 2, right?

[157] THE CLERK: Yes, sir.

THE COURT: Mr. Graham, the Court having already found that you are in violation of your probation, the Court at this time as to count 1, burglary with an assault, I'm going to adjudicate you to be guilty. You are convicted of that felony now. I am going to sentence you to life in prison with credit for the 12 months and 496 days that you have already served.

As to count 2, the attempted robbery with a weapon, the Court is going to adjudicate you to be guilty, sentence you to 15 years Florida State Prison with credit for the 12 months and 496 days that you have already served.

Those sentences will run concurrently, at the same time. Your probation is hereby revoked and terminated. Any outstanding fees and costs will be converted to a civil judgment against you.

I need to advise you if you believe this sentence has been imposed illegally that you have 30 days from today in which to file an appeal. If you cannot afford to hire an attorney for that appeal, the Court would upon notice appoint one for you. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

[158] THE COURT: All right, sir. If you will step to the side and be fingerprinted.

MR. GREGORY: Before he walks away, Your Honor, I don't know if the state has an announcement as to the substantive case that is still on the calendar.

MR. GARDNER: Not at this point, Your Honor.

MR. GREGORY: Then we need a control date, Your Honor.

MR. GARDNER: I would just ask for a week, sometime next week.

THE COURT: All right, let's pass it until next Friday.

What would that be, Madam Clerk?

THE CLERK: That will be June 2nd.

THE COURT: We will pass the remaining charges to June 2nd.

MR. GREGORY: And I can come in the morning, Your Honor?

THE COURT: Yes.

MR. GREGORY: Thank you, sir.

THE COURT: That will be June 2nd for pretrial.

MR. GARDNER: Your Honor, I tender a victim info form and an order denying restitution in this criminal punishment code score sheet for that case.

THE COURT: All right. Let's go ahead and take [159] a five minute recess so you can process him and get him cleared out, and then we will come back and we'll do the sentencing for Mr. Lawrence. Just let me know when you are ready.

(The proceedings in Mr. Graham's case were concluded at 4:26 p.m.)

– – –

[Reporter's Certificate Omitted In Printing]

Circuit Court, Fourth Judicial Circuit of Florida
State of Florida v. Terrance Jamar Graham

(Filed May 30, 2006)

STATE OF FLORIDA
UNIFORM COMMITMENT TO CUSTODY
DEPARTMENT OF CORRECTIONS
FOURTH JUDICIAL CIRCUIT COURT
DUVAL COUNTY

SPRING Term. 2006

Conviction for (offense) ARMED BURGLARY WITH ASSAULT OR BATTERY; ATTEMPTED ARMED ROBBERY. DEFT. ADJUDGED GUILTY AS TO BOTH COUNTS.

Date of conviction May 25, 2006

Date of sentence imposed May 25, 2006

Term of sentence SENTENCED TO LIFE, FLORIDA STATE PRISON, WITH CREDIT FOR (12 MONTHS & 496) DAYS; AS TO COUNT 1. AS TO COUNT 2 FIFTEEN YEARS (15) FLORIDA STATE PRISON, WITH CREDIT FOR (12 MONTHS & 496) DAYS. CONCURRENT WITH COUNT 1. PROBATION OF 12/18/03 IS SET ASIDE AND REVOKED. FINES PREVIOUSLY IMPOSED & BALANCE IS CONVERTED TO CIVIL JUDGMENT.

STATE OF FLORIDA, CASE NO.
Plaintiff, 2003-CF-11912-A DIV. CR-C

vs. OFFENDER NO. 2004-047976-0

TERRANCE JAMAR GRAHAM,

Defendant.

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO THE SHERIFF OF SAID COUNTY AND THE DEPARTMENT OF CORRECTIONS OF SAID STATE, GREETING:

The above named defendant having been duly charged with the above named offense in the above styled Court, and having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears from the attached certified copies of

INFORMATION

(Indictment) (Information)

judgment and sentence, which are hereby made parts hereof;

Now, therefore, this is to command you, the said Sheriff, to take and keep and, within a reasonable time after receiving this commitment, safely deliver the said defendant into the custody of the Department of Corrections of the State Florida; and this is to command you, the said Department of Corrections, by and through your director, superintendents, wardens, and other officials to keep and safely imprison the said defendant for the term of said sentence in the

institution in the state correctional system to which you, the said Department of Corrections, may cause the said defendant to be conveyed or thereafter transferred. And these presents shall be your authority for the same. Herein fail not.

WITNESS the Honorable LANCE M. DAY

Judge of said Court, as also JIM FULLER

Clerk, and the seal thereof, this the MAY 30, 2006

BY: /s/ [Illegible]
Deputy Clerk

(to be used in committing defendants under indeterminate sentences as well as under sentences of imprisonment for definite periods.)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL CONTY, FLORIDA

CASE NO.: 16-03-CF-11912 AX

DIVISION: CR-C

STATE OF FLORIDA,
v.
TERRANCE JAMAR GRAHAM. /

NOTICE OF APPEAL

(Filed Jun. 14, 2006)

The Defendant takes and enters an appeal to the District Court of Appeal of Florida, First District, to review the final Order of Judgment and Sentence and the Court's finding that Defendant violated his probation, entered by the Honorable Lance M. Day, Circuit Judge, the 25th day of May, 2006, and all parties to said cause are called upon to take notice of the entry of this appeal.

THE GREGORY LAW FIRM

/s/ Rodney G. Gregory
RODNEY G. GREGORY, ESQUIRE
Florida Bar No. 0288561
3900 Atlantic Boulevard
Jacksonville, FL 32207
(904) 398-0012
(904) 398-5131 (Fax)

[Certificate Of Service Omitted In Printing]

[SEAL]

CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT OF FLORIDA

LANCE M. DAY
CIRCUIT JUDGE

DUVAL COUNTY COURTHOUSE
JACKSONVILLE, FLORIDA 32202

(Filed Jul. 25, 2006)

July 24, 2006

Darin Gardner
Office of the State Attorney
330 E. Bay Street
Jacksonville, FL 32202

Rodney Gregory, Esquire
Attorney for Defendant
3900 Atlantic Boulevard
Jacksonville, Florida 32207

Re: State of Florida vs. Terrance Graham
Case No.: 16-2003-CF-11912-AXXX-MA
16-2004-CF-16505-AXXX-MA

Dear Attorneys:

Please find enclosed a copy of correspondence received in my office in regard to the above referenced Defendant for your review. The original has been filed in the Court file.

Sincerely,

/s/ Lance M. Day
LANCE M. DAY

Enclosure
psy

cc: Mary Graham
[Home Address Omitted]
St. Mary's, GA 31558

July 10, 2006

Honorable Judge Lance Day:

I am writing you at this time to ask if you would please consider a motion for a mitigation hearing for my son Terrence Graham. You honor ever since the 25th day of May I have had to make changes in my life that have affected me in more ways than you will ever know. For starters I do not know how to explain to a nine year old child what a life sentence means. It has affected my work, I have lost my appetite and have been unable to eat and keep my strength to carry on. I know that in time this shall pass also but it is going to take time.

I am trying so hard to keep my blood pressure stable so that I don't pass out in the middle of the day at work. I fear that I may suffer from heart failure as my mother did in 1990 when my brother was sentenced to life in prison. She was the same age as I am now. I still have nine and seventeen year old sons at home that I am raising alone. If something were to happen to me they would probably have to go into the foster care system as there is no one in my family to finish raising them for me. You honor I really need my son Terrence here with me to help with me with

his two brothers. I depended on his help and he was there for us.

My son did not have a chance because we had an attorney that was fighting against us and was making all of the wrong decisions. He was not explaining this situation to us properly. He was not returning any of my telephone calls. He did not meet with my son and keep him informed on what was going on. He neglected us in every way possible. He really confused me and my son. So we did not understand anything that was going on in the courtroom. Your honor the hardest thing for me is that 25th day of May is not the sentence that you gave my son but when you said to him that he will never be anything and that he can not be rehabilitated. That there was nothing you could but give him life.

Sir that is not the son that I raised, he can be helped if he was given the chance that Matthew Bates was given on the same charges that Terrence Graham was sentenced on. Matthew Bates was 17 at the time of his arrest the same as Terrence, Matthew violated his probation for armed robbery the same as Terrence. Matthew was given the chance to council [sic] other teenage children and served 8 months in the county jail. I believe that my son really could have a very good impact and touch someone else's child. Murders, Drug Dealers and Child Molesters get a release date. My son is doing life for violation of probation at the age of 19. Sir he is not the bad person that the state has painted him to be. Sir all I am asking is that you please consider looking into my

son's case again and reconsider the motion for a mitigation hearing.

/s/ Mary Graham

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D06-3190

TERRANCE JAMAR GRAHAM,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

Opinion filed April 10, 2008.

An appeal from the Circuit Court for Duval County. Lance M. Day, Judge.

Bryan S. Gowdy and John S. Mills of Mills & Creed, P.A., Jacksonville, for Appellant.

Bill McCollum, Attorney General, and Joshua R. Heller, Assistant Attorney General, Tallahassee, for Appellee.

WOLF, J.

Appellant raises a number of issues on appeal. We affirm as to all of the issues; however, we write to address appellant's assertion that his sentence of life imprisonment without the possibility of parole for a crime committed as a juvenile violates the federal

and Florida prohibitions against cruel and unusual punishment.

At the age of sixteen, appellant was charged with (1) armed burglary with assault or battery (a first-degree life felony) and (2) attempted armed robbery (a second-degree felony) for an incident involving the robbery of a local restaurant in which his codefendant assaulted the restaurant owner with a pipe. Appellant pled guilty to the offenses in return for the court withholding adjudication and three years' probation with the condition that he serve twelve months in a pre-trial detention facility.

Appellant served his twelve-month sentence and was released from jail on June 25, 2004. In December 2004, an affidavit of violation of probation was filed alleging appellant committed new law offenses to include armed home invasion robbery. At the violation of probation hearing, the State presented evidence establishing that appellant and two codefendants entered the victim's apartment forcefully and that, while appellant held the victim at gunpoint, his codefendants robbed the home. After completing the robbery, appellant and his codefendants locked the victim in a closet. Shortly after leaving the scene of the incident, appellant was involved in a lengthy car chase with the police through a residential neighborhood. After his arrest, appellant was asked about similar robberies in the same vicinity, and officers assert appellant conceded he was involved in "two or three before tonight."

Following the probation hearing, the trial court found appellant guilty of the alleged violations and sentenced him to life imprisonment without the possibility of parole. Appellant was nineteen years old at the time of his sentencing. The trial court announced its reasoning behind the sentence and stated in pertinent part:

> Mr. Graham, as I look back on your case, yours is really candidly a sad situation. You had, as far as I can tell, you have quite a family structure. You had a lot of people who wanted to try and help you get your life turned around including the court system, and you had a judge who took the step to try and give you direction through his probation order to give you a chance to get back onto track. And at the time you seemed through your letters that that is exactly what you wanted to do. And I don't know why it is that you threw your life away. I don't know why.
>
> But you did, and that is what is so sad about this today is that you have actually been given a chance to get through this, the original charge, which were very serious charges to begin with. The attempted robbery with a weapon was a very serious charge.
>
> . . . .
>
> [I]in [sic] a very short period of time you were back before the Court on a violation of this probation, and then here you are two years later standing before me, literally

the—facing a life sentence as to—up to life as to count 1 and up to 15 years as to count 2.

And I don't understand why you would be given such a great opportunity to do something with your life and why you would throw it away. The only thing that I can rationalize is that you decided that this is how you were going to lead your life and there is nothing that we can do for you. And as the state pointed out, that this is an escalating pattern of criminal conduct on your part and that we can't help you any further.

We can't do anything to deter you. This is the way you are going to lead your life, and I don't know why you are going to. You've made that decision. I have no idea. But, evidently, that is what you decided to do.

So then it becomes a focus, if I can't do anything to help you, if I can't do anything to get you back on the right path, then I have to start focusing on the community and trying to protect the community from your actions. And unfortunately, that is where we are today is I don't see where I can do anything to help you any further. You've evidently decided this is the direction you're going to take in life, and it's unfortunate that you made that choice.

I have reviewed the statute. I don't see where any further juvenile sanctions would be appropriate. I don't see where any

> youthful offender sanctions would be appropriate. Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try to protect the community from your actions.

On November 5, 2002, the Florida voters amended article I, section 17 of the Florida Constitution mandating that Florida's ban on cruel and unusual punishment be construed in conformity with the United State Supreme Court's construction of the Eighth Amendment. In his initial brief, appellant asserts both a facial and an as applied constitutional challenge to his mandatory life sentence.

I. Facial Challenge

Appellant's facial challenge to the statute authorizing life imprisonment of juveniles is based on two main components. First, appellant asserts the use of true life sentences on juveniles should be per se banned pursuant to the United States Supreme Court's holding in *Roper v. Simmons*, 543 U.S. 551 (2005), as well as other state court precedent striking similar sentences. Second, appellant asserts the use of the sentence violates international norms, as well as the United Nations International Covenant on Civil and Political Rights (ICCPR), a treaty to which the United States has become a party.

A. Per se invalid based on *Roper* and other state precedent

Appellant relies heavily on dicta found in the United States Supreme Court's opinion *Roper,* 543 U.S. at 551, to support his instant argument. In *Roper*, the Supreme Court found the imposition of the death penalty on juveniles to be per se unconstitutional for several reasons. First, the court determined that the use of the death penalty on juvenile offenders had become truly unusual as contemplated by the Eighth Amendment because of (1) the current trend by state legislatures to ban the use of the death penalty on juveniles and (2) the lack of the death penalty's use on juveniles in those states that did legalize the sentence. *Roper*, 543 U.S. at 561-68. Second, the Supreme Court noted that the death penalty could be used only for those committing a "'narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Id.* at 568 (citing *Atkins v. Virginia,* 536 U.S. 304, 319 (2002)). Based on the foregoing, the Supreme Court necessarily excluded juveniles from this category because juveniles, in the struggle to find themselves and determine their character, are more susceptible to morally reprehensible behavior, but are less likely to have "irretrievably depraved character." *Roper*, 543 U.S. at 570. Third, the Supreme Court found that, while the overwhelming weight of international opinion against the juvenile death penalty is not controlling, it provided significant confirmation that the imposition

of the death penalty on juveniles was a grossly disproportionate sentence for offenders under the age of eighteen. *Id.* at 576-77.

Appellant ignores the largest and most evident distinguishing factor of the *Roper* opinion. As the State points out, "death is different." *See also United States v. Feemster*, 483 F.3d 583, 588 (8th Cir. 2007); *vacated on other grounds*, 128 S. Ct. 880 (2008) (noting that life imprisonment for a juvenile is not cruel and unusual while acknowledging that the Eighth Amendment applies to death penalty cases with "special force") (citing *Roper*, 543 So. 2d at 568); *United States v. Salahuddin*, 509 F.3d 858 (7th Cir. 2007) (limiting the holding of *Roper* to death penalty cases and upholding the imposition of a life sentence on a juvenile); *Culpepper v. McDonough*, 2007 WL 2050970, *4-5 (M.D. Fla. July 13, 2007) (holding that the imposition of a life sentence on a juvenile does not violate the holding of *Roper); Douma v. Workman*, 2007 WL 2331883, *3 (N.D. Okla. 2007) (affirming appellant's juvenile sentence of life imprisonment without the possibility of parole and stating "the scope of *Roper* is narrow: it applies only where an individual under 18 years of age is sentenced to death"). Relying on the sound reasoning outlined in the foregoing precedent, we reject appellant's invitation to extend the holding of *Roper* to prohibit the sentencing of juveniles to life imprisonment **in all situations**.

The United States Supreme Court and the Florida Supreme Court have expressly stated that a

challenge to the length of years sentenced must rest on a determination of whether the sentence is grossly disproportionate to the crime. In *Adaway v. State*, 902 So. 2d 746, 749 (Fla. 2005), the Florida Supreme Court held that "to violate the Cruel and Unusual Punishment Clause, a prison sentence must, at least, be grossly disproportionate to the crime." Specifically, in *Adaway*, the Florida Supreme Court considered and rejected a challenge to appellant's life sentence without the possibility of parole for sexual battery on a child under the age of twelve. *Id.* In considering appellant's Eighth Amendment argument, the supreme court noted:

> The United States Supreme Court has not reached a majority consensus on the standard for determining the constitutionality of long prison sentences. *See Ewing v. California*, 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003) (plurality opinion); *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (plurality opinion). The Court has acknowledged that "in determining whether a particular sentence for a term of years can violate the Eighth Amendment, we have not established a clear or consistent path for courts to follow." *Lockyer v. Andrade*, 538 U.S. 63, 72, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003). **A majority of the Court recently agreed, however, that "[t]hrough this thicket of Eighth Amendment jurisprudence, one governing legal principle emerges as**

> **'clearly established'"—namely, that a "gross disproportionality principle is applicable to sentences for terms of years."** *Id.* (quoting 28 U.S.C. § 2254(d)(1)).

Adaway, 902 So. 2d at 748-49 (emphasis added). Further, in *Solem v. Helm*, 463 U.S. 277, 292 (1983), the United States Supreme Court announced objective criteria to be used in a "grossly disproportionate" consideration and looked specifically at: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions.

Because the weight of applicable precedent requires a fact-specific inquiry into the "grossly disproportionate" analysis, this type of constitutional argument does not lend itself to a facial challenge. To state that the imposition of a life sentence without parole on a juvenile is **per se** violative of the Eighth Amendment, a court would have to reject existing Supreme Court precedent regarding the factual inquiry required in such a case. As such, it does not appear that the United States Supreme Court contemplated this type of **per se** prohibition to a specific term of years.

In addition to the above assertion, appellant further argues that non-binding state court precedent establishes that the use of life sentences without parole in juvenile cases has become unusual as

defined by the Eighth Amendment and, thus, should be per se barred. Based on a review of these cases, we do not agree.

First, each of the state court cases cited by appellant involves an **as applied** consideration of appellant's sentencing claim. There is no per-se rule in any state rejecting the use of life sentences for juveniles in every case; each of the cases cited by appellant involves a fact-specific inquiry into the disproportionate nature of the sentence imposed to the nature of the offense and/or the appellant's age. *See People v. Miller*, 781 N.E. 2d 300, 302-08 (Ill. 2002) (holding that the imposition of a life sentence without parole for a fifteen-year-old juvenile's offense of acting as a lookout during the commission of multiple murders would violate Illinois's constitutional equivalent of the Eighth Amendment as applied to appellant, but acknowledging the legality of the sentence's use against juveniles guilty of committing more heinous crimes); *Naovarath v. State*, 779 P.2d 944, 946-47 (Nev. 1989) (invalidating the use of a true life sentence imposed on a thirteen-year-old convicted of killing his molester after considering appellant's age and mental condition at the time of the killing); *Workman v. Commonwealth*, 429 S.W.2d 374, 377-78 (Ky. Ct. App. 1968) (holding that the imposition of a true life sentence on two fourteen-year-old offenders for committing the crime of rape was violative of the Eighth Amendment prohibition on cruel and unusual punishment); *People v. Dillon*, 668 P.2d 697, 726-27

(Cal. 1983) (holding that the imposition of a true life sentence on a minor convicted of felony murder was cruel and unusual based on the specific circumstances surrounding the offense).

Additionally, several courts have upheld the imposition of a life sentence for a juvenile utilizing a similar disproportionality analysis. In *Tate v. State*, 864 So. 2d 44, 54 (Fla. 4th DCA 2003), the Fourth District considered a juvenile's challenge to the imposition of a true life sentence for his brutal murder of a six-year-old child and stated in pertinent part:

> And, finally, we reject the argument that a life sentence without the possibility of parole is cruel or unusual punishment on a twelve-year-old child and that it violates Article I, Section 17 of the Florida Constitution and the Eighth Amendment of the United States Constitution. Tate argues that his sentence is greatly disproportionate to the sentences of other juveniles charged with similar acts.
>
> In *Blackshear v. State*, 771 So. 2d 1199 (Fla. 4th DCA 2000), this court rejected a cruel or unusual punishment challenge to three consecutive life sentences imposed for three robberies committed when Blackshear was thirteen. *Id.* at 1200. Upon his guilty plea, Blackshear was certified as an adult and placed on probation. *Id.* When he violated his probation at age twenty, he was sentenced to three consecutive life sentences. *Id.* There,

we recognized that "[s]entences imposed on juveniles [as adults] of life imprisonment are not uncommon in Florida Courts." *Id.* at 1201-02.

In *Phillips v. State*, 807 So. 2d 713 (Fla. 2d DCA 2002), the defendant was fourteen years old at the time he murdered an eight year old child. He was convicted of first-degree murder and sentenced to life imprisonment without the possibility of parole. *Id.* at 714. . . . In concluding that there was no violation of proportionality, the *Phillips* court noted:

> The responsibility for making this choice rests with the legislature and is entitled to substantial deference. Further, we recognize that not every citizen nor even every member of this court will agree with the penalty established by the legislature for this crime as applied to this offender, but the legislative determination falls within the bounds of a rational conclusion regarding an appropriate prison term for the crime of first-degree murder. Finally, we find that the penalty of life imprisonment is not grossly disproportionate to the crime of first-degree murder. If, as Justice Kennedy's opinion noted, "the crime of felony murder

> without specific intent to kill . . . [is] a crime for which no sentence of imprisonment would be disproportionate," [*Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991)] [] then the sentence of life imprisonment for the specific intent crime of first-degree murder cannot be disproportionate. Accordingly, we hold that Mr. Phillips' sentence does not violate the proportionality principle mandated by the Eighth Amendment.

See also People v. Launsburry, 551 N.W.2d 460, 463-64 (Mich. Ct. App. 1996) (holding life in prison without the possibility of parole was not cruel and unusual punishment for juvenile convicted of murder); *State v. Massey*, 803 P.2d 340, 348 (Wash. Ct. App. 1990) (approving true life sentence imposed on youth convicted of committing murder at thirteen years of age), *overruled on other grounds by State v. Broadaway*, 942 P.2d 363 (Wash. 1997). These cases make clear that the imposition of a true life sentence on a juvenile has never, in state or federal courts, been considered **per se** unlawful. Accordingly, appellant cannot assert that established precedent supports a conclusion that the use of the sentence has become so unique as to be unusual as defined by the Eighth Amendment.

B. Per se invalid as contrary to international norms

As his last facial challenge, appellant asserts the use of the sentence violates international norms as well as the ICCPR treaty. In his brief, appellant states that "only fourteen nations, in theory, allow for juveniles to be sentenced to life, and only three of those nations appear to do so in practice." *See also* Human Rights Watch and Amnesty International, *The Rest of their Lives: Life Without Parole for Child Offenders in the United States*, at 111-16 (Oct. 2005), *available at* http://hrw.org/reports/2005/us1005/ (last visited March 12, 2008). Appellant further notes that, outside the United States, the number of persons serving life sentences for juvenile crimes is approximately a dozen and that the United Kingdom has recently per se barred the imposition of such a sentence in *Singh v. United Kingdom*, 1 BHRC 119, 22 EHRR 1 (1996). *See id.* at 106. Appellant points out that the United States currently has 2,225 persons sentenced to life for juvenile crimes; Florida houses 273 such persons. *Id.* This court acknowledges that, above all others, this argument is the strongest in support of a **per se** ban on the use of a true life sentence for juveniles. Specifically, in *Roper*, the United States Supreme Court discussed the weight to be given international pressure to change our existing legal system and noted:

> Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark

reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. **This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility**. Yet at least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." 356 U.S., at 102-103, 78 S.Ct. 590 (plurality opinion) ("The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime"); see also *Atkins*, *supra*, at 317, n. 21, 122 S.Ct. 2242 (recognizing that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved"); *Thompson*, *supra*, at 830-831, and n. 31, 108 S.Ct. 2687 (plurality opinion) (noting the abolition of the juvenile death penalty "by other nations that share our Anglo-American heritage, and by the leading members of the Western European community," and observing that "[w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"); *Enmund*, *supra*, at 796-797, n. 22, 102 S.Ct. 3368 (observing that "the doctrine of felony murder has been abolished

in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe"); *Coker*, *supra*, at 596, n. 10, 97 S.Ct. 2861 (plurality opinion) ("It is . . . not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue").

. . . .

Over time, from one generation to the next, the Constitution has come to earn the high respect and even, as Madison dared to hope, the veneration of the American people. *See The Federalist* No. 49, p. 314 (C. Rossiter ed. 1961). The document sets forth, and rests upon, innovative principles original to the American experience, such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply

> underscores the centrality of those same rights within our own heritage of freedom.

543 U.S. at 575-76.

Similar to the imposition of the death penalty on juvenile offenders, the sentencing of a juvenile to a true life sentence is frowned upon by the international community. However, in *Roper*, the United States Supreme Court further noted that it is for the courts of the United States, not the international or community courts, to interpret the Eighth Amendment's protections. 543 U.S. at 575-77. As such, international pressure must be balanced with the due deference owed the state legislatures of this country in matters of sentencing. Specifically, any analysis applying the Eighth Amendment must provide due deference to "the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals." *Solem*, 463 U.S. at 290. While the weight given the international community is persuasive, it cannot be said to counter the individual rights of the state to impose its chosen sentencing scheme if that scheme is not held to be otherwise unconstitutional.

II. As Applied Challenge

A. As applied to appellant, the life sentence is grossly disproportionate to his offense

Appellant asserts his particular sentence is "grossly disproportionate" to his offense and, thus, violates the Eighth Amendment's ban on cruel and unusual punishment. Based on the *Solem* disproportionality analysis, we do not agree.

In *Blackshear*, 771 So. 2d at 1199, the Fourth District considered a nearly identical challenge to the Eighth Amendment by an appellant who had been a juvenile upon the commission of his underlying offense, who subsequently violated his probation through the commission of several robberies, and was resentenced for the original offense at the age of twenty. In *Blackshear*, the Fourth District affirmed the imposition of a life sentence and noted in pertinent part:

> Appellant also complains that his life sentences, imposed for crimes he committed at age thirteen, amount to cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution and Article I, Section 17, of the Florida Constitution. **However, when appellant committed his crimes and was certified as an adult, he was placed on probation, *not* sentenced to life imprisonment as he could have been under the sentencing guidelines. The life sentences were**

imposed only after the violation of probation, when appellant was twenty years old. Thus, appellant was sentenced at age twenty for crimes that the legislature has authorized a sentence of life imprisonment. *See Hale v. State*, 630 So. 2d 521, 526 (Fla.1993) (length of sentence imposed is matter of legislative prerogative).

Even considering age, appellant's sentence is not grossly disproportionate. Appellant was originally charged and sentenced as an adult and did not object. The crimes to which he pled were serious, violent crimes. By his plea and sentence to probation, he was given an opportunity to avoid incarceration by successfully completing his probation, which he did not. Instead he was arrested for possession of a firearm in violation of his probation. Finally, the life sentence was imposed for a violation of probation at age twenty. Not only was the sentence imposed for three different armed burglaries, but appellant also had a long history of other convictions, including five for strong armed robbery, many convictions for burglary, grand theft, and additional misdemeanors.

Sentences imposed on juveniles of life imprisonment are not uncommon in Florida Courts. *See, e.g., Ritchie v. State*, 651 So. 2d 167 (Fla. 1st DCA 1995) (upholding a juvenile's life sentence for a second degree

murder conviction); *Colon v. Irwin,* 732 So. 2d 428 (Fla. 5th DCA 1999) (addressing a juvenile's petition for writ of mandamus to release documents who had been sentenced to life for first degree murder); *Manuel v. State,* 629 So. 2d 1052 (Fla. 2nd DCA 1993) (remanding to consider whether thirteen year old sentenced to life had counsel for prior juvenile convictions included in scoresheet which recommended life sentence for attempted murder and armed robbery). Other states have also explicitly upheld similar sentences. *See, e.g., State v. Walker*, 252 Kan. 117, 843 P.2d 203 (1992) (life sentence for fourteen year old active participant in two aggravated kidnapings and an aggravated arson); *State v. Foley,* 456 So. 2d 979 (La.1984) (fifteen year old's life sentence without the possibility of parole for aggravated rape proportional); *White v. State,* 374 So. 2d 843 (Miss.1979) (life without possibility of parole for sixteen year old armed robber and kidnaper); *People v. Isitt,* 55 Cal.App.3d 23, 127 Cal.Rptr. 279 (1976) (seventeen year old sentenced to life without parole for kidnaping and robbery with bodily harm); *Rogers v. State,* 257 Ark. 144, 515 S.W.2d 79 (1974) (seventeen year old first time offender rapist sentenced to life without possibility of parole); *Howard v. State,* 319 So. 2d 219 (Miss.1975) (sixteen year old's twenty-five year sentence for attempted armed robbery not cruel and unusual); *State v. Haley,* 87 Ariz. 29, 347 P.2d 692 (1959) (not cruel and

> inhuman to sentence fifteen year old who committed robbery, aggravated assault, and lewd and lascivious acts to twenty-three to thirty years).

771 So. 2d 1201-02 (emphasis added). The reasoning in *Blackshear* is sound and highly relevant to the current appeal. In his "disproportionate" argument, appellant emphasizes that he was sixteen at the time of the commission of his original offense and that the offense involved a restaurant burglary in which he personally injured no one. However, this argument glosses over the record facts which establish that, after being placed on probation—an extremely lenient sentence for the commission of a life felony—appellant committed at least two armed robberies and confessed to the commission of an additional three. These offenses were not committed by a pre-teen, but a seventeen-year-old who was ultimately sentenced at the age of nineteen. Additionally, these robberies involved the use of a weapon, and appellant himself held a gun to a man's head during the incident for which he was violated.

While the United States Supreme Court has noted that juveniles in general are more amenable to successful rehabilitation, the particular facts of this case cut against rehabilitation for appellant. As the trial court noted in its sentencing colloquy, appellant was given an unheard of probationary sentence for a life felony, he wrote a letter expressing his remorse and promising to refrain from the commission of further crime, and he had a strong family structure to

support him. However, appellant rejected his second chance and chose to continue committing crimes at an escalating pace.

It is the tested theory of rehabilitation on appellant that sets this case apart from other challenges to a juvenile's life sentence. There is record evidence to support appellant's inability to rehabilitate—evidence that is usually not available upon an original sentencing proceeding. The trial court balanced the possibility of appellant's rehabilitation with the safety of society in determining his sentence and was well within its discretion to do so. Accordingly, while appellant is correct that a true life sentence is typically reserved for juveniles guilty of more heinous crimes such as homicide, none of the cases cited by appellant involved a tested theory of rehabilitation. *See Tate*, 864 So. 2d at 46-47, 54-55; *Phillips,* 807 So. 2d at 713. Based on *Blackshear,* the gravity of appellant's crimes, as well as the treatment of like juveniles, supports the imposition of appellant's true life sentence premised on a *Solem* factor analysis. As such, similar to the defendant in *Blackshear* and based on the particular facts of this case, appellant's sentence does not violate either the Florida or the United States Constitutions' ban on cruel and unusual punishment.

B. International treaty violation

Appellant further asserts the imposition of such a sentence violates the ICCPR, an international treaty ratified by the United States in 1966. Even if appellant has standing to personally invoke the provisions of the ICCPR (*compare Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F.Supp. 542, 545-47 (D.D.C.1981) (holding that the defendant lacked standing to challenge the death penalty based on the ICCPR because treaties apply only to disputes between sovereign governments), *with United States v. Duarte-Acero*, 208 F.3d 1282, 1286 (11th Cir. 2000) (holding that "[t]he clear language of the ICCPR manifests that its provisions are to govern the relationship between an individual and his state")), a plain reading of the ICCPR does not support appellant's contention. While the ICCPR's juvenile provisions (1) emphasize the rehabilitation and education of juveniles; (2) require the separation of child offenders from adults; and (3) require that the provisions of treatment be appropriate to the child's age, upon ratifying the ICCPR, the U.S. Senate attached the following limiting reservation:

> (5) That the policy and practice of the United States are generally in compliance with and supportive of the [ICCPR's] provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in **exceptional circumstances**, to treat juveniles as adults, notwithstanding paragraphs 2(b)

> and 3 of Article 10 and paragraph 4 of Article 14. . . .

See 138 Cong. Rec. S4781-01 (daily ed. April 2, 1992) (Emphasis added). Appellant asserts that the term "exceptional circumstances" in the above reservation indicates that the United States' ratification of the ICCPR prohibits appellant's sentence in this case.

In *Kane v. Winn,* 319 F.Supp.2d 162, 196 (D. Mass. 2004), the Massachusetts district court considered the ICCPR as well as other treaties when discussing the rights of prisoners to be heard following disciplinary actions; the court stated in pertinent part:

> Treaties are as legally binding as federal statutes, and if a treaty and a federal statute conflict, the later in time is controlling. *See United States v. Dion,* 476 U.S. 734, 738, 106 S.Ct. 2216, 90 L.Ed.2d 767 (1986); *Trans World Airlines, Inc. v. Franklin Mint Corp.,* 466 U.S. 243, 252, 104 S.Ct. 1776, 80 L.Ed.2d 273 (1984); *Chae Chan Ping v. U.S.,* 130 U.S. 581, 600, 602-03, 9 S.Ct. 623, 32 L.Ed. 1068 (1889); *Whitney v. Robertson,* 124 U.S. 190, 194, 8 S.Ct. 456, 31 L.Ed. 386 (1888); *Edye v. Robertson* (Head Money Cases), 112 U.S. 580, 597-99, 5 S.Ct. 247, 28 L.Ed. 798 (1884). At the same time a treaty can only be directly applied in a case if it is self-executing—that is, if the provisions "act directly" on the issues in question, rather than merely "pledge the faith of the United States to pass acts which shall ratify and

confirm them." *Foster v. Neilson,* 27 U.S. (2 Pet.) 253, 314, 7 L.Ed. 415 (1829), *overruled in part on other grounds, United States v. Percheman,* 32 U.S. (7 Pet.) 51, 89, 8 L.Ed. 604 (1833). **If the treaty is non-self-executing, it "addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."** *Foster,* 27 U.S. (2 Pet.) at 254.

Even when a treaty is not self-executing, **courts must strive not to interpret statutes to conflict with the international obligations expressed in such a treaty.** *See Murray v. Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804) ("[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains. . . ."); *see also MacLeod v. United States,* 229 U.S. 416, 434, 48 Ct.Cl. 512, 33 S.Ct. 955, 57 L.Ed. 1260 (1913) ("The statute should be construed in the light of the purpose of the government to act within the limitation of the principles of international law, . . . and it should not be assumed that Congress proposed to violate the obligations of this country to other nations. . . ."); *Ware v. Hylton,* 3 U.S. (3 Dall.) 199, 260-61, 1 L.Ed. 568 (1796) (Iredell, J.) (stating the principle that statutes should not be interpreted to violate international legal obligations); Restatement (Third) of the Foreign Relations Law of the United States [hereinafter "Restatement"] § 114.

Id. at 196-97 (emphasis added). The ICCPR was ratified subject to a declaration of non-execution. *See* 138 Cong. Rec. S4781-01. As such, appellant has no judicially enforceable right directly arising out of a challenge to the ICCPR as it would be interpreted by its signatory nations; his argument can attack only the breadth of United States law implementing the treaty. *Pierre v. Gonzales*, 502 F.3d 109 (2d Cir. 2007). This case does not involve such an attack. Until the treaty is implemented though [sic] congressional action, it cannot act as a limitation on the power of the Florida Legislature to determine the appropriate penalties for violations of the law. *Medellin v. Texas*, 2008 WL 762533, *8-10 (Mar. 25, 2008) (reaffirming that non-self-executing ratifications of international treaties cannot act as a limit on state power unless legislation exists implementing the treaty).

For the foregoing reasons, this court declines to implement a per se ban on the sentencing of juveniles to life imprisonment. Additionally, based on the underlying facts of this case, this court does not find appellant's sentence was grossly disproportionate to his crime. Accordingly, we affirm appellant's sentences.

THOMAS, J., and PLEUS, JR., ROBERT J., ASSOCIATE JUDGE, CONCUR.

DISTRICT COURT OF APPEAL,
FIRST DISTRICT
301 S. Martin Luther King, Jr. Blvd.
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

May 16, 2008

CASE NO.: 1D06-3190
L.T. No.:
16-03-CF-11912 AX

Terrance Jamar Graham v. State Of Florida

Appellant/Petitioner(s), Appellee/Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion filed April 25, 2008, for rehearing, clarification and certification is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

John S. Mills
Trisha Meggs Pate, A.A.G.

Bryan S. Gowdy
Hon. Bill McCollum, A.G.
Joshua R. Heller, A.A.G.

jm

/s/ Jon S. Wheeler
JON S. WHEELER, CLERK [SEAL]

Supreme Court of Florida

FRIDAY, AUGUST 22, 2008

CASE NO.: SC08-1169
Lower Tribunal No(s).:
1D06-3190

TERRANCE JAMAR GRAHAM vs. STATE OF FLORIDA

Petitioner(s) Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d).

WELLS, ANSTEAD, PARIENTE, LEWIS, and CANTERO, JJ., concur.

A True Copy
Test:

/s/ Thomas D. Hall
Thomas D. Hall [SEAL]
Clerk, Supreme Court

bm

Served:

HON. JON S. WHEELER, CLERK
JOHN STEWART MILLS
BRYAN SCOTT GOWDY
JOSHUA RYAN HELLER
HON. JIM FULLER, CLERK
HON. LANCE M. DAY, JUDGE

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

May 4, 2009

Mr. John S. Mills
Mills Creed & Gowdy, P.A.
865 May Street
Jacksonville, FL 32204

Re: Terrance Jamar Graham
v. Florida
No. 08-7412

Dear Mr. Mills:

The Court today entered the following order in the above stated case:

"The motion of petitioner for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted."

* * *

Sincerely,

/s/ D J McNerney
Denise J. McNerney
Merits Cases Clerk

PETITIONER'S BRIEF

133

(2)

No. 08-7412

Supreme Court, U.S.
FILED
JUL 16 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writ Of Certiorari
To The District Court Of Appeal,
First District, State Of Florida

BRIEF FOR PETITIONER

DREW S. DAYS, III
BRIAN R. MATSUI
SETH M. GALANTER
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, D.C. 20006

GEORGE C. HARRIS
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105

BRYAN S. GOWDY
Counsel of Record
JOHN S. MILLS
REBECCA BOWEN CREED
JESSIE L. HARRELL
MILLS CREED & GOWDY, P.A.
865 May Street
Jacksonville, FL 32204
(904) 350-0075

Attorneys for Petitioner

July 16, 2009

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BOTH 4UP4#1

712A

QUESTION PRESENTED

Whether the Eighth Amendment's ban on cruel and unusual punishments prohibits the imprisonment of a juvenile for life without the possibility of parole as punishment for the juvenile's commission of a non-homicide (armed burglary).

PARTIES TO THE PROCEEDING

All the parties to the proceeding are listed on the cover of the brief.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
INTRODUCTION	2
STATEMENT OF THE CASE	3
A. Florida's Statutory Scheme For Prosecuting, Convicting, And Sentencing Juveniles In Adult Courts	3
1. Prosecution of juveniles in adult courts	3
2. Sentencing of juveniles in adult courts	6
B. Factual Background And Procedural History	11
1. Graham's conviction and original guilty plea	11
2. Revocation of Graham's probation	15
3. Post-sentencing motion and appeal	23
SUMMARY OF ARGUMENT	24
ARGUMENT	30

TABLE OF CONTENTS – Continued

Page

I. THE EIGHTH AMENDMENT'S PROPORTIONALITY PRINCIPLE INCLUDES CONSIDERATION OF THE CHARACTERISTICS AND DIMINISHED CULPABILITY OF JUVENILE OFFENDERS, ALONG WITH OTHER FACTORS 29

II. SENTENCING A JUVENILE CONVICTED OF A NON-HOMICIDE OFFENSE TO LIFE WITHOUT PAROLE VIOLATES THE EIGHTH AMENDMENT'S PROPORTIONALITY PRINCIPLE 36

A. Juvenile Offenders Under 18 Years Of Age As A Class Are Different From Adult Offenders With Regard To Culpability, Susceptibility To Deterrence, And Potential For Rehabilitation 36

B. Life Without Parole For A Juvenile, Non-Homicide Offense Is Not Justified By Any Legitimate Penological Purpose 43

1. Retribution 44

2. Rehabilitation and Incapacitation ... 44

3. Deterrence 46

C. Graham's Life-Without-Parole Sentence Rests On Judicial Reasoning That Contradicts *Roper*'s Rationale And Does Not Reflect A Legislative Judgment 48

TABLE OF CONTENTS – Continued

Page

1. Courts lack the expertise, as a matter of judicial discretion, to distinguish between those juveniles who are capable of rehabilitation and being deterred and those who are not 48

2. Petitioner's life-without-parole sentence is not the result of any legislative judgment that such a sanction should be imposed on a juvenile 50

D. Imprisoning A Juvenile For Life Without Parole For Non-Homicide Offenses Like Armed Burglary Is Cruel When Compared To The Gravity Of The Offense And Unusual Because Most Jurisdictions Rarely, If Ever, Impose Such A Sentence 54

1. Petitioner's sentence of life without parole for armed burglary satisfies any Eighth Amendment threshold requirement that there be an inference of gross disproportionality 54

2. Graham's sentence is unusual in Florida and far exceeds the average sentences imposed on other Florida offenders for more serious or similar offenses 56

TABLE OF CONTENTS – Continued

Page

3. Comparison of Graham's sentence to the sentences for juvenile offenders in other American jurisdictions demonstrates that his sentence is unusual both in theory and practice 61

4. Graham's sentence is unusual in that it would not be imposed anywhere else in the world 64

CONCLUSION 66

APPENDIX A: Jurisdictions Permitting A Life-Without-Parole Sentence For A Burglary Conviction By A Juvenile Offender Without Any Prior Convictions 1A

APPENDIX B: Jurisdictions Permitting A Life-Without-Parole Sentence For A Burglary Conviction By A Juvenile Offender With Prior Convictions 2A

APPENDIX C: Jurisdictions Permitting A Life-Without-Parole Sentence For Juvenile Offenders Convicted Of Non-Homicide Offenses 9A

TABLE OF AUTHORITIES

Page

CASES:

Atkins v. Virginia, 536 U.S. 304 (2002) 32, 43

Beatty v. State, 983 So. 2d 701 (Fla. Dist. Ct. App. 2008) 6

Burrell v. State, 483 So. 2d 479 (Fla. Dist. Ct. App. 1986) 11

Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) 37

Coker v. Georgia, 433 U.S. 584 (1977) 31

Cuciak v. State, 394 So. 2d 500 (Fla. Dist. Ct. App. 1981), *aff'd*, 410 So. 2d 916 (Fla. 1982) 15

Enmund v. Florida, 458 U.S. 782 (1982) .....*passim*

Ewing v. California, 538 U.S. 11 (2003) .....*passim*

Furman v. Georgia, 408 U.S. 238 (1972) 34

Harmelin v. Michigan, 501 U.S. 957 (1991) .....*passim*

Helm v. Solem, 684 F.2d 582 (8th Cir. 1982) 45

Holmes v. State, 638 So. 2d 986 (Fla. Dist. Ct. App. 1994) 7

In re Nunez, 93 Cal. Rptr. 3d 242 (Cal. Ct. App. 2009) 54

Johnson v. Texas, 509 U.S. 350 (1993) 38, 49

Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) 28, 31, 55

Lockyer v. Andrade, 538 U.S. 63 (2003) 30, 31, 33

Michael v. State, 992 So. 2d 367 (Fla. Dist. Ct. App. 2008) 15

TABLE OF AUTHORITIES – Continued

Page

New Jersey v. T.L.O., 469 U.S. 325 (1985) 40

People v. Davis, 633 P.2d 186 (Cal. 1981) (en banc) 54

Postell v. State, 971 So. 2d 986 (Fla. Dist. Ct. App. 2008) 8

Roper v. Simmons, 543 U.S. 551 (2005).....*passim*

Rummel v. Estelle, 445 U.S. 263 (1980).....25, 32, 33

Ruth v. State, 949 So. 2d 288 (Fla. Dist. Ct. App. 2007) 7

Solem v. Helm, 463 U.S. 277 (1983).....*passim*

Thompson v. Oklahoma, 487 U.S. 815 (1988) 37, 38

Tison v. Arizona, 481 U.S. 137 (1987).....34

Trop v. Dulles, 356 U.S. 86 (1958).....33, 56

United States v. Bajakajian, 524 U.S. 321 (1998).....56

Woodson v. North Carolina, 428 U.S. 280 (1976).....34, 36

U.S. CONSTITUTION, STATE STATUTES & RULES:

U.S. Const. amend. VIII .....*passim*

Fla. Stat.

§ 775.082(3)(b) (2003) 61

§ 775.082(3)(c) (2003).....61

§ 775.082(8)(d) (2003) 8

TABLE OF AUTHORITIES – Continued

Page

§ 775.082(9) (2003) 8
§ 775.0823 (2003) 9
§ 775.0823(8) (2003) 9
§ 775.087 (2003) 9
§ 775.087(2)(a) (2003) 8
§ 775.0875(2) (2003) 9
§ 775.31(1)(e) (2003) 9, 61
§ 777.04(1) (2003) 13
§ 777.04(4)(a) (2003) 13
§ 782.04 (2003) 9
§ 782.04(1)(a)(1) (2003) 61
§ 782.04(1)(b) (2003) 61
§ 782.051(1) (2003) 9
§ 782.07(2) (2003) 61
§ 782.07(3) (2003) 61
§ 784.045(1)(a)(2) (2003) 61
§ 787.01 (2003) 9
§ 787.02 (2003) 9
§ 790.16(1) (2003) 9
§ 790.161 (2003) 9
§ 790.166(2) (2003) 9, 61
§ 794.011 (2003) 9
§ 794.011(4)(e) (2003) 61

TABLE OF AUTHORITIES – Continued

Page

§ 794.023 (2003) 9
§ 810.02(1)(b) (2003) 13, 52
§ 810.02(2) (2003) 9, 14
§ 810.02(2)(a) (2003) 13, 52
§ 810.02(2)(b) (2003) 13, 52
§ 812.13(2)(a) (2003) 9
§ 812.13(2)(b) (2003) 13
§ 812.133(2)(a) (2003) 9
§ 843.167(3)(e) (2003) 9
§ 874.04(2)(c) (2003) 9
§ 876.38 (2003) 9
§ 893.135 (2003) 9
§ 921.002(1) (2003) 10
§ 921.002(1)(b) (2003) 43, 52
§ 921.002(1)(c) (2003) 52
§ 921.002(1)(d) (2003) 52
§ 921.002(1)(e) (2003) 11
§ 921.002(1)(g) (2003) 8, 52
§§ 921.0022-921.00265 (2003) 10
§ 921.0026 (2003) 10
§ 921.0026(2)(k) (2003) 11
§ 921.0026(2)(l) (2003) 11
§ 958.04 (2003) 7

TABLE OF AUTHORITIES – Continued

Page

§ 958.04(1) (2003) 7
§ 958.04(2) (2003) 7
§ 985.03(3) (2003) 4
§ 985.03(6) (2003) 4
§ 985.0301(2) (2008) 4
§ 985.0301(3) (2008) 4
§ 985.0301(5) (2008) 7
§ 985.201(2) (2003) 4
§ 985.201(4) (2003) 7
§ 985.219(8) (2003) 4
§ 985.225(1) (2003) 4
§ 985.226(2) (2003) 4
§ 985.226(3) (2003) 4
§ 985.227 (2003) 4
§ 985.227(1)(a) (2003) 5
§ 985.227(1)(b) (2003) 5
§ 985.227(2) (2003) 5
§ 985.233 (2003) 14
§ 985.233(1)(b) (2003) 6
§ 985.233(4)(a) (2003) 6
§ 985.233(4)(c) (2003) 7
§ 985.56(1) (2008) 4
§ 985.556(2) (2008) 4

TABLE OF AUTHORITIES – Continued

Page

§ 985.556(3) (2008) 4

§ 985.557 (2008) 4

§ 985.565(4)(a) (2008) 6

Miss. Code Ann. § 47-5-139(1) 63

Fla. R. Crim. P. 3.800(b)(2)(B) 23

OTHER AUTHORITIES:

Paolo G. Annino, David W. Rasmussen, and Chelsea Rice, *Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to the Nation* (2009) 59, 62, 63, 64

Jeffrey J. Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339 (1992) 38

Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 Mich. L. Rev. 1145 (2009) 34, 44, 45, 46

Mary Beckman, *Crime, Culpability, and the Adolescent Brain*, 305 Science 596 (2004) 39

James Bjork et al., *Developmental Differences in Posterior Mesofrontal Cortex Recruitment By Risky Rewards*, 27 J. of Neurosci. 4839 (2007) 42

William H. Burgess, *Florida Sentencing* (2008-2009 ed.) 8, 10, 11

TABLE OF AUTHORITIES – Continued

Page

Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity and Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 Behav. Sci. & L. 741 (2000).....38

Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. Rev. 983 (Aug. 2008).....64, 66

Dep't of Health & Human Servs., Center for Disease Control Task Force on Community Preventive Services, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System*, Morbidity & Mortality Weekly Report (Nov. 30, 2007).....46

John F. Edens et al., *Assessment of "Juvenile Psychopathy" and Its Association with Violence: A Critical Review*, 19 Behav. Sci. L. 53 (2001).....49

Erik H. Erikson, *Identity: Youth and Crisis* (1968).....41, 48

Neir Eshel et al., *Neural Substrates of Choice Selection in Adults and Adolescents: Development of the Ventrolateral, Prefrontal and Anterior Cingulate Cortices*, 45 Neuropsychologia 1270 (2007).....42

Jeffrey Fagan, *The Comparative Impacts of Juvenile and Criminal Court Sanctions on Adolescent Felony Offenders*, 1 Law & Policy 18 (1996).....47

TABLE OF AUTHORITIES – Continued

Page

Jeffrey Fagan, *Why Science and Development Matter in Juvenile Justice*, The American Prospect, Aug. 14, 2005 39

Jeffrey Fagan et al., *Be Careful What You Wish for: Legal Sanctions and Public Safety Among Adolescent Offenders in Juvenile and Criminal Court*, Columbia Law School, Pub. Law Research Paper No. 03-61 (July 2007) 48

Fla. Dep't of Corrs., Bureau of Research and Data Analysis, *Time Served by Criminals Sentenced to Florida's Prisons: The Impact of Punishment Policies from 1979 to 2004* (Aug. 2004) 57

Fla. Dep't of Corrs., *2005-2006 Annual Report: The Online Guidebook to the Florida Prison System* (2007) 58, 60

Charles E. Frazier et al., *Get-Tough Juvenile Justice Reforms: The Florida Experience*, 564 Annals Am. Acad. Pol. & Soc. Sci. 167 (1999) 5

Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 Developmental Psychol. 625 (2005) 39, 41

Peggy C. Giordano et al., *Changes in Friendship Relations Over the Life Course: Implications for Desistance from Crime*, 41 Criminology 293 (2003) 41

TABLE OF AUTHORITIES – Continued

Page

Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. Applied Developmental Psychol. 257 (2001) 38

Dana L. Haynie, *Friendship Networks and Delinquency: The Relative Nature of Peer Delinquency*, 18 J. Quantitative Criminology 99 40

Human Rights Watch/Amnesty Int'l, *The Rest of their Lives: Life Without Parole for Child Offenders in the United States* (2005) 55, 64, 66

Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 Crime & Delinq. 96 (1994).....47

Terrie E. Moffitt, *Natural Histories of Delinquency in* CROSS-NATIONAL LONGITUDINAL RESEARCH ON HUMAN DEVELOPMENT AND CRIMINAL BEHAVIOR 3 (Elmar G.M. Weitekamp & Hans-Jurgen Kerner eds., 1994) 39

Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Disclosure*, 41 U.C. Davis L. Rev. 111 (2007) 35, 45

Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation & Planning*, 11 Developmental Rev. 1 (1991) 39

TABLE OF AUTHORITIES – Continued

Page

Richard E. Redding, U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Transfer Law: An Effective Deterrent to Delinquency?* (2008).....47

Robert J. Sampson & John H. Laub, *Crime in the Making: Pathways and Turning Points Through Life*, 39 Crime & Delinquency 396 (1993).....46

Robert Shepherd, *The Relevance of Brain Research to Juvenile Justice*, 19 Crim. Just. 51 (2005).....43

Simon I. Singer & David McDowall, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 L. & Soc'y Rev. 521 (1988).....47

Laurence Steinberg, *Adolescence* 88 (6th ed. 2002).....38

Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009 (2003).....46, 49

U.N., *Int'l Covenant on Civil & Political Rights*, G.A. Res. 2200A, Art. 24(1), U.N. GAOR, 16th Sess., Supp. No. 16, U.N. Doc. A/6316 (1966).....65, 66

TABLE OF AUTHORITIES – Continued

Page

U.N. Convention on Rights of the Child, Art. 37(a), U.N. Doc. A/44/736, 28 I.L.M. 1456 (Nov. 20, 1989) 66

U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, U.N. Doc. CCPR/C/USA/CO/3 (Sept. 15, 2006) 65

U.S. Census Bureau, 2009 Statistical Abstract (2009) 57

U.S. Sentencing Guidelines Manual (2008) 55

L. Winner et al., *The Transfer of Juveniles to Criminal Court: Reexamining Recidivism Over the Long Term*, 43 Crime & Delinq. 548 (1997) 48

OPINIONS BELOW

The opinion and judgment of the First District Court of Appeal of Florida (J.A. 406-431) is reported at 982 So. 2d 43 (Fla. Dist. Ct. App. 2008). The First District Court of Appeal's order (J.A. 432) denying rehearing, clarification, and certification is unreported. The Supreme Court of Florida's order declining to accept jurisdiction (J.A. 433-434) is unreported.

JURISDICTION

The opinion and judgment of the First District Court of Appeal of Florida was entered on April 10, 2008. J.A. 406. The First District Court of Appeal denied petitioner's timely motion for rehearing, clarification, and certification on May 16, 2008. J.A. 432; Pet. App. 95-103. The Supreme Court of Florida denied petitioner's timely petition for review on August 22, 2008. J.A. 433; Pet. App. 105. Petitioner timely filed his petition for *certiorari* on November 20, 2008. This Court granted the petition on May 4, 2009. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the U.S. Constitution provides that, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

INTRODUCTION

At age 16, petitioner Terrance Graham committed the only offenses for which he has ever been convicted. He was an accomplice to an armed burglary and attempted armed robbery of a restaurant. Petitioner pled guilty to these offenses stemming from this single incident, and, as part of a subsequent probation violation he committed as a juvenile, he was sentenced to the statutory maximum penalty—life imprisonment without the possibility of parole—for the crime he committed as a 16-year-old.

This sentence, based upon the acts petitioner engaged in as a juvenile, cannot be reconciled with this Court's precedents under the Eighth Amendment. As this Court recognized in *Roper v. Simmons*, 543 U.S. 551 (2005), the characteristics of juvenile offenders, in particular their diminished culpability, make them categorically different from adult defendants who have committed the same crimes. And because of these differences between juveniles and adults, the severity of the criminal sanction, which is unquestionably harsher for a 16-year-old assigned to an adult prison population in perpetuity than it is for an adult, cannot be considered proportional to any non-homicide offenses committed.

Not surprisingly, almost every United States jurisdiction implicitly has recognized that the imposition of a life-without-parole sentence on a juvenile, non-homicide offender cannot be reconciled

with basic understandings of decency which undergird the Eighth Amendment. Florida stands nearly alone in its punishment of juveniles, such as petitioner, who have not taken or attempted to take a life, as it is one of just six States known to be incarcerating such offenders in perpetuity. And of the just 106 known juvenile non-homicide offenders serving a life-without-parole sentence in the United States, 77 of them are in Florida.[1] Moreover, only Florida and South Carolina permit a first-time juvenile offender such as petitioner to be sentenced to life imprisonment for the crime of armed burglary, and only Florida does so in practice.

STATEMENT OF THE CASE

A. Florida's Statutory Scheme For Prosecuting, Convicting, And Sentencing Juveniles In Adult Courts

1. Prosecution of juveniles in adult courts

Florida law has a general rule that precludes a juvenile from being prosecuted in adult court. Over the years, however, that rule has become so riddled with exceptions that, at the discretion of a prosecutor,

---

[1] As used in this brief, a "non-homicide offender" is one whose offenses neither resulted in a death nor involved an intent to kill. Therefore, offenders convicted of attempted murder and felony murder would not be considered "non-homicide" offenders.

virtually any juvenile over the age of 14 can be prosecuted in adult court.

The general rule is that "if it is shown that the person was a child at the time the offense was committed," any prosecution must be initiated in juvenile court, and the offender must be subject to sentences specifically established for juvenile offenders. Fla. Stat. §§ 985.201(2), 985.219(8) (2003)[2] *re-codified at* Fla. Stat. § 985.0301(2), (3) (2008). Florida criminal law defines a "child," "juvenile," or "youth" as "any married or unmarried person who is charged with a violation of law occurring prior to the time that person reached the age of 18 years." Fla. Stat. § 985.03(6) (2003). An "adult" is "any natural person other than a child." *Id.* § 985.03(3).

Notwithstanding the general legislative prohibition on prosecuting a juvenile as an adult, a prosecutor may, and sometimes must, transfer a juvenile 14 years or older to adult court by directly filing an information. Fla. Stat. § 985.227 (2003), *re-codified at* Fla. Stat. § 985.557 (2008).[3] The "direct-file" statute

---

[2] This brief cites the 2003 version of the Florida Statutes, as that version was in effect when Graham committed the offenses of which he was convicted.

[3] A Florida prosecutor may also transfer a juvenile to adult court by seeking either an indictment from a grand jury against a juvenile of any age or a judicial waiver for a juvenile 14 years or older. Fla. Stat. §§ 985.225(1), 985.226(2), (3) (2003), *re-codified at* Fla. Stat. §§ 985.56(1), 985.556(2), (3) (2008). According to a study, ninety-nine percent of the juveniles prosecuted in Florida's adult courts in 1998 were charged by the

(Continued on following page)

mandates prosecution of a juvenile as an adult if certain criteria are satisfied; for example, 16- and 17-year-old juvenile offenders must be prosecuted as adults if they actually possessed a firearm or destructive device while committing certain offenses. Fla. Stat. § 985.227(2) (2003). None of the mandatory direct-file provisions applied in this case.

Florida's direct-file statute, however, vests the prosecutor with broad, often unreviewable, discretion to prosecute a juvenile 14 years or older in adult court when it does not otherwise mandate such a prosecution. A prosecutor may charge any juvenile who was 16 or 17 years old in adult court if, in the "judgment and discretion" of the prosecutor, "the public interest requires that adult sanctions be considered or imposed." *Id.* § 985.227(1)(b). And if the offense is a felony, the prosecutor's exercise of this discretion is unreviewable. *Ibid.* For any juvenile who was 14 or 15 years old at the time of the offense, the prosecutor's unreviewable "judgment and discretion" may be exercised for 19 enumerated felonies, including armed burglary and robbery. *Id.* § 985.227(1)(a).

---

direct-file method discussed in the text. Charles E. Frazier et al., *Get-Tough Juvenile Justice Reforms: The Florida Experience*, 564 Annals Am. Acad. Pol. & Soc. Sci. 167, 178 (1999) (citing 1998 report of Florida Department of Juvenile Justice).

2. Sentencing of juveniles in adult courts

a. Juveniles who are prosecuted and convicted in a Florida adult court may nonetheless be eligible for a sentence as a "juvenile" or as "youthful offender," rather than as an adult. Fla. Stat. § 985.233(4)(a) (2003), *re-codified at* Fla. Stat. § 985.565(4)(a) (2008); *see also Beatty v. State*, 983 So. 2d 701, 702-703 (Fla. Dist. Ct. App. 2008) (reviewing adult court's decision to sentence juvenile as an adult for an abuse of discretion).

In order for an adult court to impose juvenile sanctions in lieu of adult penalties, the court must consider several enumerated factors relating to the seriousness of the crime and the individual's prior criminal history and potential for rehabilitation. Fla. Stat. § 985.233(1)(b) (2003).[4] Any confinement under

---

[4] These include: (i) the seriousness of the offense to the community and whether the community would be protected best by juvenile or adult sanctions; (ii) whether the offense was committed in an aggressive, violent, premeditated, or willful manner; (iii) whether the offense was against persons or property; (iv) the offender's sophistication and maturity; (v) the offender's record and previous history; (vi) the prospects for adequate protection of the public and the likelihood of deterrence and reasonable rehabilitation of the offender if sentenced to juvenile sanctions; (vii) whether the department responsible for administering juvenile sanctions (the Department of Juvenile Justice) has appropriate programs, facilities, and services immediately available; and (viii) whether adult sanctions would provide more appropriate punishment and deterrence to further violations of law than the imposition of juvenile sanctions. *Ibid.* If a child later proves to be "not suitable" for juvenile sanctions, the court may revoke the

(Continued on following page)

a juvenile sanction generally ceases when an offender turns 19 years of age and, under no circumstances, does it extend beyond the offender's 22nd birthday. Fla. Stat. § 985.201(4) (2003), *re-codified at* Fla. Stat. § 985.0301(5) (2008).

Florida also allows lesser "youthful offender" penalties for a juvenile defendant in adult court who committed his offense when he was under 21 years of age and satisfies certain other criteria. Fla. Stat. § 958.04(1) (2003). Such penalties generally do not exceed a term of six years, *id.* § 958.04(2), and include supervision on probation or in a community control program, incarceration at various types of facilities (including those with youthful offender programs), or a combination of supervision and incarceration. *Ibid.* If a Florida adult court exercises its discretion to classify a defendant as a youthful offender, the court is not constrained by any mandatory minimum sentence. *Ruth v. State*, 949 So. 2d 288, 290 (Fla. Dist. Ct. App. 2007). Unlike the decision on whether to impose juvenile sanctions, no legislative criteria guide the adult court's discretion in deciding whether to impose youthful offender penalties in lieu of adult penalties. Fla. Stat. § 958.04 (2003). An adult court may impose youthful offender penalties if it "believes" that they are "appropriate." *Holmes v. State*, 638 So. 2d 986, 987 (Fla. Dist. Ct. App. 1994); *see also*

---

juvenile sanctions and impose either youthful offender or adult penalties. *Id.* § 985.233(4)(c).

Postell v. State, 971 So. 2d 986, 989 & n.6 (Fla. Dist. Ct. App. 2008).

b. Any juvenile defendant who is not sentenced as a juvenile or youthful offender in adult court is sentenced as an adult.

Although Florida has statutory mandatory minimum sentences, *see, e.g.*, Fla. Stat. § 775.082(9) (2003) (establishing mandatory minimum sentences for repeat offenders); Fla. Stat. § 775.087(2)(a) (2003) (establishing mandatory minimum sentences for certain crimes involving a firearm), none of them were applicable in this case. Florida courts are otherwise granted substantial discretion in deciding what sentences to impose pursuant to Florida law. Fla. Stat. §§ 775.082(8)(d), 921.002(1)(g) (2003).

From 1983 until 1998, maximum criminal sentences were subject to mandatory sentencing guidelines. *See* 16 William H. Burgess, *Florida Sentencing* §§ 2:1, 3:1, 4:1, 5:1 (2008-2009 ed.). In 1998, however, Florida repealed the sentencing guidelines and enacted in their place the Criminal Punishment Code. *Id.* § 5:1. The Code significantly increased the maximum sentence for many defendants (including juveniles prosecuted as adults) because, barring an upward departure, the prior guidelines set a maximum sentence that was usually substantially below the statutory maximum. *See generally id.* §§ 3:35, 4:41, 5:5. Accordingly, for offenses committed after 1998, a Florida court's discretion at the upper end of the sentencing range is constrained only by the

statutory maximum, which for over 50 different offenses is life imprisonment without parole, irrespective of the offender's criminal history or lack of criminal history.[5]

In the absence of guidelines for establishing the maximum sentence, the Florida Legislature has set forth "principles" to be considered in sentencing, including:

> (b) The primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment.
>
> (c) The penalty imposed is commensurate with the severity of the primary offense and

---

[5] *See, e.g.*, Fla. Stat. §§ 775.0823, 782.04, 782.051(1) (2003) (various degrees of murder and attempted murder); *id.* §§ 775.0823(8), 787.01, 787.02 (kidnapping and false imprisonment); *id.* § 775.087 (various offenses for possessing or discharging a firearm or destructive device); *id.* § 775.0875(2) (taking an officer's firearm during first degree felony); *id.* § 775.31(1)(e) (facilitating terrorism); *id.* § 790.16(1) (discharging machine gun in public with intent to do harm); *id.* § 790.161 (destructive device causing death); *id.* § 790.166(2) (making or using available weapon of mass destruction); *id.* § 794.011, 794.023 (various offenses of sexual battery); *id.* § 810.02(2) (armed burglary); *id.* § 812.13(2)(a) (robbery with dangerous weapon); *id.* § 812.133(2)(a) (carjacking with deadly weapon); *id.* § 843.167(3)(e) (interception of police communication to aid escape); *id.* § 874.04(2)(c) (criminal street gang activity); *id.* § 876.38 (intentional interference with defense or prosecution of war); *id.* § 893.135 (various offenses for trafficking, importing, or manufacturing illegal drugs).

> the circumstances surrounding the primary offense.
>
> (d) The severity of the sentence increases with the length and nature of the offender's prior record.
>
> * * *
>
> (g) The trial court judge may impose a sentence up to and including the statutory maximum for any offense, including an offense that is before the court due to a violation of probation or community control.
>
> * * *
>
> (i) Use of incarcerative sanctions is prioritized toward offenders convicted of serious offenses and certain offenders who have long prior records * * * .

Fla. Stat. § 921.002(1) (2003). None of these principles discuss or mention children or youth. *Ibid.*

With respect to minimum sentences, Florida continues to use guidelines that address the severity of the offense, criminal record, and injury to the victim. Burgess, *supra*, § 5:5; *see also* Fla. Stat. §§ 921.0022-921.00265 (2003). The only mention of youth in the Code is found in a provision governing minimum sentences. That provision identifies the mitigating circumstances upon which a court may find a downward departure and thus sentence the defendant below the minimum sentence imposed by the Code's point-scoring method. Fla. Stat. § 921.0026 (2003). A court can consider the youth of the offender

and whether the offender was too young to appreciate the consequences of the offense. Fla. Stat. § 921.0026(2)(k), (l) (2003).

c. Florida law limits the ability of prisoners to receive early release. The Criminal Punishment Code explicitly prohibits parole for all offenses committed after 1998. Fla. Stat. § 921.002(1)(e) (2003). The Code's predecessor, the guidelines, prohibited parole for almost all crimes committed between 1983 and 1998. *Burrell v. State*, 483 So. 2d 479, 480 (Fla. Dist. Ct. App. 1986); Burgess, *supra*, § 1:57.

B. Factual Background And Procedural History

1. Graham's conviction and original guilty plea

a. Graham was born on January 6, 1987. J.A. 50. His parents were addicted to crack cocaine. J.A. 446. Graham "most likely suffered a form of cocaine addiction at birth." J.A. 448. His mother stopped smoking crack by the time Graham turned 11, but his father still smoked crack cocaine in the home when Graham turned 16. J.A. 446. Graham had a "long term depression," which he "most likely had since early on" because of his parents' crack addiction. J.A. 446, 448.

While in elementary school, Graham was diagnosed as suffering from ADHD, but his mother told him not to take the prescribed medication, Ritalin. J.A. 447. Graham wanted to move out of his

home as soon as possible so as not to be around his father, who was unemployed. *Ibid.* Graham's father and siblings have had various problems with the law, including time in prison and juvenile detention facilities. J.A. 442, 447.

b. On July 18, 2003, Graham, age 16, with school-age accomplices, burglarized and attempted to rob a restaurant. J.A. 14-16, 407, 437-439.

A description of Graham's crimes is located in the State's pre-trial discovery and a presentence investigation report prepared by the Florida Department of Corrections. J.A. 437-439. This report was not presented at Graham's 2003 plea hearing, but rather was prepared for later sentencing hearings that took place in 2006, after Graham's probation was revoked. J.A. 201-202, 439. Graham has never admitted that the facts in the report or the pre-trial discovery are accurate, nor does he do so now.

According to the report and pre-trial discovery, one accomplice worked at the restaurant where his father was a manager. This first accomplice left the restaurant unlocked so that Graham and a second accomplice could enter the restaurant just after closing. During the burglary and attempted robbery, Graham and the second accomplice, Brandon J. Johnson, wore masks. J.A. 14-16, 437-438. The second accomplice twice hit a restaurant manager on the head with a steel bar or bat, which resulted in

several stitches.[6] J.A. 9, 14-16, 35, 205, 437-438. Graham and the second accomplice ran out of the back of the restaurant without any money and fled in a car driven by a third accomplice. J.A. 14-16, 437-438. A couple months later, the police apprehended Graham at his mother's house, where he was hiding under his bed. J.A. 438-439.

The prosecutor exercised her unreviewable discretion to directly file charges against Graham and two of his accomplices in adult court, while charging the first accomplice (who left the restaurant door open) in juvenile court. J.A. 6-7, 10, 28. The prosecutor's information accused Graham of two crimes: (i) armed burglary with assault or battery, a first-degree felony with a maximum penalty of life imprisonment without parole, Fla. Stat. § 810.02(1)(b), (2)(a), (b) (2003), and (ii) attempted armed robbery, a second degree felony with a maximum penalty of 15 years in prison, Fla. Stat. §§ 812.13(2)(b), 777.04(1), (4)(a) (2003). J.A. 6-7, 9, 407.

Graham pled guilty to these crimes in December 2003. J.A. 17-27, 31-38, 407. He did not allocute or stipulate to the facts underlying the crimes to which he pled guilty. J.A. 31-38. During the plea colloquy, the adult court mistakenly informed Graham that, if he violated his probation, the crimes to which he was

---

[6] The restaurant manager hit on the head was not the father of the first accomplice who left the door open.

pleading guilty would be "punishable by up to 30 years in prison." J.A. 34. In fact, the armed burglary charge was punishable by life imprisonment without parole, Fla. Stat. § 810.02(2) (2003). Before pleading guilty, Graham told the court in writing that he had "decided to turn [his] life around" and that if he got a second chance, he would do "whatever it takes to get to the NFL." J.A. 380.

Under Graham's guilty plea, adjudication of guilt was withheld, and he was sentenced to three years of probation. J.A. 17-27, 42-48. He was required to spend 12 months of the probationary period in a pre-trial detention facility with 101 days credit for time served. *Ibid.* Graham also waived his right to be sentenced as a juvenile or youthful offender as well as all other rights and alternatives accorded to juveniles under Fla. Stat. § 985.233 (2003). J.A. 22. For example, Graham waived his right to a pre-sentence investigation report that would have assessed whether he was more suitable for juvenile or adult sanctions. J.A. 22-23. The plea agreement stated that Graham had knowingly, freely, and voluntarily waived these rights because "to be sentenced as an adult * * * [was] the best thing for [him] to do." J.A. 22. Graham was also certified by the court as an adult for any future violations of Florida law. J.A. 28.

The plea agreement and order of probation imposed multiple conditions, including those that required Graham to: (i) attend educational and personal self-improvement programs both within the jail and outside of jail under the supervision of his

probation officer; (ii) advance his studies and education; (iii) refrain from violating the law or the school code; (iv) obey his parents; (v) abide by a 10:00 p.m. curfew; and (vi) refrain from possessing firearms or associating with persons engaged in criminal activity. J.A. 18-21, 42-48.

2. Revocation of Graham's probation

a. On December 6, 2004, Graham's probation officer filed an affidavit alleging that Graham had violated his probation four days earlier. J.A. 53-55, 407. The alleged violations included: (i) possession of a firearm; (ii) violations of the law (home invasion robbery and fleeing and attempting to elude a law enforcement officer); and (iii) association with persons engaged in criminal activity. J.A. 53-55.

A year later, in December 2005 and January 2006, the adult court held hearings on the alleged violations. J.A. 67-204. Graham had no right to a jury trial in a violation-of-probation proceeding, and the court was required to find only that the violations were committed by a preponderance of the evidence. *See, e.g.*, *Michael v. State*, 992 So. 2d 367, 369 (Fla. Dist. Ct. App. 2008); *Cuciak v. State*, 394 So. 2d 500, 502 (Fla. Dist. Ct. App. 1981), *aff'd*, 410 So. 2d 916 (Fla. 1982). The judge presiding over the probation revocation hearing was different from the judge who had accepted Graham's plea. J.A. 30, 67.

At the hearing, Graham admitted that he violated his probation by fleeing and attempting to

elude a law enforcement officer. J.A. 64-66, 81-82, 198-199. The court advised Graham that this admission, by itself, would expose him to a sentence of life imprisonment. J.A. 98-102. Graham nonetheless continued to admit to this conduct, but refused to admit to the home invasion robbery and other violations. *Ibid.*

At the evidentiary hearing, the State asserted that Graham and two accomplices—both of whom were 20-years old[7]—knocked on the door and then entered the home of Carlos Rodriguez. J.A. 112-114; State's Answer Br. 5-7. The State asserted that Graham and his accomplices put a pistol to Mr. Rodriguez's stomach, demanded money, and then robbed a gold chain from Mr. Rodriguez's friend who was at the residence. J.A. 113-115. Later that evening, Graham was apprehended after a car chase and questioned by the police. J.A. 89, 157-160. In response to the question "[a]side from the two robberies tonight how many more were you involved in," Graham responded, "[t]wo or three before tonight." J.A. 160. However, the home invasion robbery at Mr. Rodriguez's residence was the only robbery alleged by the State, and found by the court, to be a violation of Graham's probation. J.A. 53-55, 198-200.

---

[7] See note 10, *infra*, for the Florida Department of Corrections online offender profiles where the birthdates of the two probation violation accomplices may be located.

The court found, by a preponderance of the evidence, that Graham violated his probation not only by committing a home invasion robbery but also by possessing a firearm and associating with persons engaged in criminal activity. J.A. 198-200. The court reiterated that Graham had admitted a violation by fleeing and attempting to elude a law enforcement officer. J.A. 199. Because Graham did not understand the court's findings, the court had to repeat them to him, and then the court refused to repeat them again when Graham said he still did not understand. J.A. 199-200, 202-203.

b. After finding that Graham violated his probation, the court held a sentencing hearing interspersed over several days in 2006. During this hearing, no expert testimony regarding Graham's future dangerousness was offered.

At the sentencing hearing, the court was made aware of the more lenient sentence it had previously given Brandon J. Johnson, one of Graham's accomplices for the underlying armed burglary charges arising from the incident at the restaurant in July 2003. J.A. 252-260. Johnson (not Graham) was the one who used a steel pipe or bat to twice hit the head of the restaurant manager. J.A. 14-15, 437-439. Like Graham, Johnson also was subsequently incarcerated on account of a probation violation (for armed robbery of a gas station). Johnson, however, received only a three-year sentence for the underlying

restaurant burglary.[8] J.A. 254, 259. Johnson—who is just six months younger than Graham—is no longer incarcerated, having been released from prison in 2007. *See* note 8, *supra*.

At the sentencing hearing, the police officer who apprehended Graham testified about the charge of fleeing and eluding an officer. J.A. 246-250. The prosecutor also presented letters from the victim of the original charge to which Graham pled guilty (the restaurant manager) and from the victim of the home invasion robbery that was the basis for the alleged probation violations (Mr. Rodriguez). J.A. 205-207, 227-230. The victim of the home invasion, Mr. Rodriguez, also testified that he believed Graham was the leader of the robbery and that Graham had pointed a cocked gun at his head. J.A. 318-319. Mr. Rodriguez explained that he and his family were "very scared" after the robbery, and they were attempting to save "some money to be able to move somewhere else and to try to forget this." J.A. 320.

The court heard testimony from Graham's mother, father, and other family members, beseeching the court to give Graham a lenient sentence in part due to his youth. J.A. 214-225, 270-274. After hearing the mother's testimony, the court told her, "It sounds

---

[8] *See* http://www.dc.state.fl.us/AppCommon/ (last visited on July 12, 2009). At this Florida Department of Corrections webpage, one can locate Brandon J. Johnson's offender profile by typing his DC number (J25712).

like you have done your job." J.A. 220. And, it also told her, "[D]on't walk out of here thinking that you somehow created all of this because you haven't." J.A. 221. Furthermore, the court chastised Graham for abandoning his family and for "hang[ing] around" his "group" of "so-called friends" and "buddies." J.A. 268.

Graham also testified at sentencing. J.A. 261-281, 372-385, 390-391. When Graham fled from the police, it was shortly after 9:00 p.m. J.A. 58. In response to questions from the court as to why he had fled from the police, Graham responded, "Because I have a 10:00 curfew, which I did make, which I was making every night, and either way it goes, if I would have missed my curfew I still would have been violated." J.A. 263-264. In apparent disbelief, the court warned Graham to be candid, to "give it to [him] * * * straight," and for there to be "no more smoke." J.A. 266. The court explained that Graham's truthfulness probably would be the "most important" consideration in deciding Graham's sentence. J.A. 281. Graham said that he was willing to "man[ ] up" to the fleeing and eluding charge. J.A. 263-264. And he admitted that his actions showed that he "wasn't thinking," that he had let his family down, and that he had not kept the promises he had made to Judge Dearing (the judge who placed him on probation). J.A. 269, 275, 380-381. Graham, however, would not admit that he did the home invasion robbery, a charge that, he believed, "they [were] trying to pin against" him. J.A. 275-276, 376-377, 380-381. Graham also denied that he had confessed to the police. J.A. 276, 381.

Graham also asserted to the court that he had been "compliant" on his probation. J.A. 390-391. Apparently astonished, the court told Graham that his assertion did not "really make sense." J.A. 391. Committing a crime, the court said, was the "biggest no no" while on probation. *Ibid.*

Under the Criminal Punishment Code scoresheet, 60 months was the lowest sentence that Graham could receive absent a downward departure, and life imprisonment was the maximum sentence. J.A. 289-290. The State asserted that Graham was "incapable of rehabilitation" and recommended 30 years for the armed burglary and 15 years for the attempted armed robbery. J.A. 388. Graham's counsel recommended the minimum sentence of 60 months. J.A. 389. In its pre-sentence investigation report, the Department of Corrections recommended that Graham receive 48 months of prison or alternatively 24 months of prison followed by 24 months of community control.[9] J.A. 444. The Department noted that Graham had the "usual teenage problems," but none that were excessive or resulted in suspensions from school. *Ibid.* The Department further noted that, prior to his arrest, Graham had been compliant with the terms of his probation, reported as required, never missed a curfew, and performed the required community service at his high school. *Ibid.*

---

[9] The Department presumably arrived at the 48-month number by deducting from the 60-month minimum the 12 months that Graham already had served on his original charge.

The court rejected all the recommended sentences. It imposed a sentence of life imprisonment for the armed burglary and 15 years for the attempted armed robbery. J.A. 291, 299, 301, 395. The court explained that Graham was incapable of being rehabilitated or deterred from future crimes and that protecting the community by incapacitating Graham was the court's only option:

> Mr. Graham, as I look back on your case, yours is really candidly a sad situation. You had, as far as I can tell, you have quite a family structure. You had a lot of people who wanted to try and help you get your life turned around including the court system, and you had a judge who took the step to try and give you direction through his probation order to give you a chance to get back onto track. And at the time you seemed through your letters that that is exactly what you wanted to do. And I don't know why it is that you threw your life away. I don't know why.
>
> But you did, and that is what is so sad about this today is that you have actually been given a chance to get through this, the original charge, which were very serious charges to begin with. The burglary with assault charge is an extremely serious charge. The attempted robbery with a weapon was a very serious charge.
>
> * * *
>
> [I]n a very short period of time you were back before the Court on a violation of this

probation, and then here you are two years later standing before me, literally * * * facing a life sentence * * * as to count 1 and up to 15 years as to count 2.

And I don't understand why you would be given such a great opportunity to do something with your life and why you would throw it away. The only thing that I can rationalize is that you decided that this is how you were going to lead your life and there is nothing that we can do for you. And as the state pointed out, that this is an escalating pattern of criminal conduct on your part and that we can't help you any further. We can't do anything to deter you. This is the way you are going to lead your life, and I don't know why you are going to. You've made that decision. I have no idea [why]. But, evidently, that is what you decided to do.

So then it becomes a focus, if I can't do anything to help you, if I can't do anything to get you back on the right path, then I have to start focusing on the community and trying to protect the community from your actions. And unfortunately, that is where we are today is I don't see where I can do anything to help you any further. You've evidently decided this is the direction you're going to take in life, and it's unfortunate that you made that choice.

I have reviewed the statute. I don't see where any further juvenile sanctions would

> be appropriate. I don't see where any youthful offender sanctions would be appropriate. Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try to protect the community from your actions.

J.A. 392-394.

The two other accomplices alleged to have been involved in the home invasion robbery were both 20 years old at the time of the robbery, and they each received lesser sentences (11 and 35 years).[10]

3. Post-sentencing motion and appeal

After sentencing, Graham timely filed in the state trial court a post-sentencing motion and supporting memorandum of law challenging the legality of his sentence under the Eighth Amendment. Pet. App. 24-56. This motion was deemed denied by operation of law because the state trial court did not rule on it within 60 days. *See* Fla. R. Crim. P. 3.800(b)(2)(B). On appeal, the First District Court of Appeal rejected Graham's Eighth Amendment argument based in part on the rationale that "death

---

[10] *See* http://www.dc.state.fl.us/AppCommon/ (last visited on July 12, 2009). At this Florida Department of Corrections webpage, one can locate Kirkland G. Lawrence's and Meigo A. Bailey's offender profiles by typing their respective DC numbers (J24134 and J33262).

is different." J.A. 406-431. The Supreme Court of Florida denied discretionary review. J.A. 433-434. This Court granted a writ of *certiorari* on May 4, 2009. J.A. 435.

SUMMARY OF ARGUMENT

I.

In *Roper v. Simmons*, 543 U.S. 551 (2005), this Court held that the characteristics of juvenile offenders, in particular their diminished culpability and capacity for change, rendered the death penalty unconstitutional as applied to offenders who committed their offenses before the age of 18 years old, even though the death penalty is otherwise constitutional when applied to adult offenders. These same considerations require that a life-without-parole sentence imposed on a juvenile offender for a non-homicide is unconstitutional.

The Eighth Amendment prohibits grossly disproportionate sentences of imprisonment. Under its well-settled precedent, this Court considers the sentence's underlying penological purposes and legislative judgments; the harshness of the sentence compared to the gravity of the offense; and a comparison of the sentencing laws and practices of the States and the international community. No single factor is dispositive.

The argument that "death is different" does not alter this analysis or cabin *Roper* to capital cases. In

both capital and non-capital cases, the Court also has examined the offender's characteristics to determine whether a sentence is grossly disproportionate. In *Rummel v. Estelle*, 445 U.S. 263, 276 (1980), and *Ewing v. California*, 538 U.S. 11 (2003), the Court explained that an otherwise grossly disproportionate sentence can nonetheless be constitutionally permissible under the Eighth Amendment if the offender is a recidivist.

Like the death penalty, a life-without-parole sentence rejects rehabilitation and is an irrevocable sentence with regard to the many years lost while incarcerated. And for a non-homicide, juvenile offense, life without parole is a severe punishment. Granted, the Court has cited "death is different" as a basis to mandate more stringent procedures for death-penalty sentencing, including an examination of the offender's potentially mitigating characteristics on a case-by-case basis. But those requirements are unrelated to the Court's proportionality analysis. Petitioner does not claim any constitutional right to a similar, individualized sentencing procedure. Indeed, *Roper* rejected the notion that a juvenile offender's future characteristics as an adult could be accurately determined on a contemporaneous, individualized basis at sentencing.

II.

A. Graham's sentence is grossly disproportionate when viewed through the prism of

his status as a juvenile offender. *Roper* concluded that juveniles are less culpable than adults for their criminal conduct, primarily because of three basic differences between juveniles and adults. First, juveniles possess less maturity and an underdeveloped sense of responsibility, which often results in impetuous and ill-considered actions and decisions. Second, juveniles are more vulnerable and susceptible to negative influences and outside pressures, including peer pressure. Third, the personality and character traits of juveniles are less well-formed and more transitory. These uncontestable common-sense distinctions between juveniles and adults have been confirmed by the undisputed scientific evidence and ratified in the laws of the several States by the numerous age-based legislative classifications for voting, marriage, and other adult activities. *Roper* and the scientific data confirm that the irresponsible conduct of juveniles is morally less reprehensible than the same conduct by adults.

B. The underdeveloped personality characteristics of juveniles relied upon in *Roper* render imprisoning juvenile offenders for life without parole for non-homicide offenses unjustifiable. The lesser culpability of juveniles undermines the State's goal of retribution in imposing a sentence of life without parole. And the State's goal of deterrence is not accomplished by imprisoning juveniles to a life sentence without the possibility of parole because, as the Court in *Roper* acknowledged and scientific research has proven, the threat of adult punishment

does not deter misconduct by juveniles. Finally, life without parole rejects rehabilitation and embraces incapacitation. As the *Roper* Court noted, juveniles are more malleable and capable of reform than adults; it is cruel to simply "give up" on them.

C. This case confirms the inherent difficulties in sentencing a juvenile to life without parole, and the judgment of the court below at sentencing directly contradicts *Roper*'s rationale. The court concluded that Graham—who at age 16 committed the only crimes for which he has ever been convicted—was incapable of *ever* being rehabilitated or deterred from committing more offenses. But this Court in *Roper* explicitly concluded that a sentencer could not reliably predict a juvenile's potential for rehabilitation and deterrence. Not even "expert psychologists [can] differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper*, 543 U.S. at 573.

Nor is Graham's life-without-parole sentence the result of any legislative judgment. In *Solem v. Helm*, 463 U.S. 277 (1983), this Court invalidated a life-without-parole sentence in part because the legislature there did not *mandate* such a sentence but rather merely *permitted* it. Subsequently, in upholding a life-without-parole sentence *mandated* by the legislature, Justice Kennedy distinguished *Solem* by explaining that it repudiated the "judgment of a single jurist," not the judgment of a legislature. *Harmelin v. Michigan*, 501 U.S. 957, 1006 (1991)

(Kennedy, J., concurring in part and concurring in judgment). In this case, the Florida Legislature has not mandated that a juvenile be sentenced to life without parole for committing an armed burglary.

D. The unconstitutionality of Graham's sentence is confirmed by the fact that he is one of a handful of juveniles, in *any* State, who has been sentenced to life without parole for a non-homicide offense such as armed burglary. A comparative analysis is required because, as a threshold matter, Graham's sentence is the same as the harshest sentence that a juvenile could receive for murder, and thus is disproportionate in light of the less serious nature of Graham's offense, an armed burglary which did not involve the taking of a life or an attempt to take life. Indeed, the harshest adult punishment (death) would not be constitutional for any similar offense committed by an adult offender. *Enmund v. Florida*, 458 U.S. 782, 787, 801 (1982); *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2645-2648, 2660 (2008).

Graham's sentence is significantly greater than the average sentences for *all* offenders (adult and juvenile) convicted in Florida of violent crimes (8.5 times greater) or armed burglaries (7.1 times greater). Though Graham's armed burglary conviction is comparable to the offenses of thousands of juvenile offenders, Florida has sentenced only 77 juvenile offenders to life without parole for a mere non-homicide offense.

More significantly, compared to the rest of the Nation, Florida stands virtually alone. Florida leads the Nation in imprisoning juveniles for non-homicide offenses. Outside of Florida, there is *no* juvenile, non-homicide offender serving a life-without-parole sentence for a burglary offense, and only one other State even permits such a sentence for a first-time armed burglary offender such as Graham. Looking at all non-homicides, there are only 29 juvenile, non-homicide offenders serving life without parole outside of Florida, and they are concentrated in five other States. This means that Florida incarcerates approximately 70% of the Nation's juvenile, non-homicide offenders. Finally, the international community has overwhelmingly rejected and condemned the practice of imprisoning juveniles for life without parole.

ARGUMENT

I. The Eighth Amendment's Proportionality Principle Includes Consideration Of The Characteristics And Diminished Culpability Of Juvenile Offenders, Along With Other Factors

The Eighth Amendment's protection against cruel and unusual punishment "flows from the basic precept of justice that punishment for crime should be graduated and proportioned to the offense." *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (citation omitted) (internal quotation marks omitted).

This proportionality principle is not limited to capital sentences. It is settled that a "grossly" disproportionate sentence, such as the life sentence imposed on Graham for an armed burglary committed at the age of 16 (his first conviction), can run afoul of the Eighth Amendment. *See Solem v. Helm*, 463 U.S. 277, 288-290 (1983) (holding that a "criminal sentence must be proportionate to the crime for which the defendant has been convicted" and rejecting the argument that the proportionality principle applied only to capital cases); *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) (holding that it was clearly established that the proportionality principle applied to sentences for terms of years); *Ewing v. California*, 538 U.S. 11 (2003).[11]

---

[11] In *Ewing*, seven Justices agreed that the proportionality principle applied to non-capital sentences; three Justices opined that the principle should be narrow for non-capital punishments, whereas four Justices opined that it should be broad. *Compare* 538 U.S. at 20 (plurality opinion) ("The Eighth Amendment * * * contains a narrow proportionality principle that applies to noncapital sentences." (citation omitted) (internal quotation marks omitted)), *with id.* at 35 (Stevens, J., dissenting) ("I think it clear that the Eighth Amendment's prohibition of 'cruel and unusual punishments' expresses a broad and basic proportionality principle that takes into account all of the justifications for penal sanctions."). Although the four dissenters in *Ewing* advocated for a "broad" principle, they also applied the narrow proportionality analysis set forth in Justice Kennedy's concurring opinion in *Harmelin*. *See Ewing*, 538 U.S. at 23-24 (plurality opinion); *id.* at 35-36 (Breyer, J., dissenting). Although two Members of the Court would have rejected as an initial matter the proposition that the Eighth Amendment includes any proportionality principle, *see id.* at 31-32 (Scalia, J.,

(Continued on following page)

a. The Court considers several factors (none of which is dispositive) in determining whether a sentence is sufficiently disproportionate to violate the Eighth Amendment. *Harmelin v. Michigan*, 501 U.S. 957, 1004 (1991) (Kennedy J., concurring in part and concurring in judgment); *Solem*, 463 U.S. at 290 n.17. These factors include: (i) whether the particular sentence would serve a legitimate penological purpose, with due deference for legislative judgments; (ii) a comparison of the gravity of the offense with the harshness of the punishment imposed; and (iii) a comparison of the sentence imposed to evolving standards of decency as reflected in the laws and practices of the States and the international community. *See, e.g., Kennedy v. Louisiana*, 128 S. Ct. 2641, 2651-2658 (2008); *Roper*, 543 U.S. at 561, 564-567, 575-578; *Harmelin*, 501 U.S. at 1005 (Kennedy J., concurring in part and concurring in judgment); *Ewing*, 538 U.S. at 23-24 (plurality opinion) (adopting Justice Kennedy's *Harmelin* concurrence); *Solem*, 463 U.S. at 290-291 (citing *Enmund v. Florida*, 458 U.S. 782, 797-799 (1982); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion)). Ultimately, however, this Court must bring to bear its own judgment to determine whether a sentence violates the Eighth Amendment. *See, e.g., Kennedy*, 128 S. Ct. at 2658.

---

concurring in judgment); *id.* at 32 (Thomas, J., concurring in judgment), those Justices joined the Court's opinion in *Lockyer* that held it was clearly established that a gross disproportionality principle applied to sentences for terms of years. *Lockyer*, 538 U.S. at 72.

b. In examining whether a sentence is grossly disproportionate, the Court also focuses on the characteristics of the offender as they relate to the offense committed and the sentence that has been imposed.

Under these principles, recidivists can be subject to harsher penalties under the Eighth Amendment. A defendant's prior criminal history can ameliorate concerns that a sentence is grossly disproportionate to the offense committed. The Court has explained that a State is justified "in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society." *Rummel v. Estelle*, 445 U.S. 263, 276 (1980). Accordingly, this Court in examining concededly "long" sentences has been guided by the fact that the defendant's prior offenses "were serious felonies" so that the sentence "reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated." *Ewing*, 538 U.S. at 30 (plurality opinion).

Likewise, juvenile defendants as a class possess certain characteristics, in particular diminished culpability and capacity for change, that render unconstitutional their sentences, even though such sentences would be constitutional if applied to adult defendants. *See Roper*, 543 U.S. at 569-575; *see also Atkins v. Virginia*, 536 U.S. 304, 317-321 (2002) (applying same rationale to protect mentally retarded

defendants). Juveniles thus "cannot with reliability be classified among the worst offenders." *Roper*, 543 U.S. at 569. The *Roper* Court recognized that the inherent characteristics of juvenile defendants affected the efficacy of the penological purposes, such as retribution and deterrence, served by imposing a severe punishment (the death penalty) on juvenile offenders. *Id.* at 571-572.

As applied to the instant case, these precedents demonstrate that petitioner's sentence—imposed for a first offense (armed burglary) committed when he was 16 years old—must be examined in light of the characteristics of juveniles.

c. The court below was wrong that "death is different" to find the holding of *Roper* inapplicable to this case. J.A. 412. There is no principled reason to limit consideration of the juvenile status of an offender to only death penalty cases. *See Solem*, 463 U.S. at 289 ("When we have applied the proportionality principle in capital cases, we have drawn no distinction with cases of imprisonment."); *see also Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (establishing, in a non-death penalty case, that the Eighth Amendment must draw its meaning from the "evolving standards of decency that mark the progress of a maturing society"). Such a rule would be inconsistent with the rulings of this Court in *Rummel*, *Ewing*, and *Lockyer*, each of which also relied upon the status of the defendant as a recidivist when examining whether the particular

sentence imposed was grossly disproportionate to the offense committed.

It is no answer that the death penalty is different from ordinary punishment because of its severity, *see, e.g., Tison v. Arizona*, 481 U.S. 137, 149 (1987); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion), as that is nothing more than a restatement of the basic principle that the Eighth Amendment forbids "only *extreme* sentences that are 'grossly disproportionate' to the crime." *Harmelin*, 501 U.S. at 100 (Kennedy, J., concurring in part and concurring in judgment) (emphasis added) (quoting *Solem*, 463 U.S. at 288). Moreover, as this case demonstrates, life without parole is extreme, harsh, and, at the very least, comparable to a death penalty in its cruelness when applied to a juvenile offender convicted of a non-homicide.

The notion that death can be different from other punishments because the death penalty is "unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice," *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring), also has no application to this case. Since *Furman* was decided in 1972, rehabilitation has been frequently rejected as a goal of imprisonment. Parole is often no longer possible in numerous jurisdictions. Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 Mich. L. Rev. 1145, 1173 (2009); *see also Harmelin*, 501 U.S. at 1028 (Stevens, J., dissenting) (noting that a sentence of life

imprisonment without the possibility of parole "does share one important characteristic of a death sentence" in that it "does not even purport to serve a rehabilitative function"); Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Disclosure*, 41 U.C. Davis L. Rev. 111, 162 (2007) (noting that a life-without-parole sentence "deprives children of both any hope for return to society and any opportunity for rehabilitation"). Indeed, Florida long ago abolished parole, and its Criminal Punishment Code expressly subordinates the goal of rehabilitation to secondary status. *See* pages 7-8, *supra*.

Moreover, the finality of a sentence of death also should not preclude application of *Roper*'s principles to this case. The fact that a death sentence is final does not diminish the fact that a sentence of life imprisonment, too, is irreversible once it has been served, as those years cannot be brought back and end only with death. The sentence in this case is the final judicial word on whether petitioner will ever be let out of prison. This analysis is not altered by the remote possibility of executive clemency, something that, in theory, is available for both death penalty and non-capital sentences.

More significantly, however, any distinctions in this Court's case law between the death penalty and other punishments have been focused on the *procedures* used in sentencing, not in applying the principle that sentences must be proportional. The finality of a sentence of death imposes "a

corresponding difference in the need for reliability in the determination that death is the appropriate punishment *in a specific case*." *Woodson*, 428 U.S. at 305 (plurality opinion) (emphasis added). Accordingly, even if a sentence of death is constitutionally proportionate to a particular type of offense or category of offender, it still may run afoul of the Eighth Amendment "if it is imposed without an individualized determination that that is 'appropriate.'" *Harmelin*, 501 U.S. at 995-996. That line of cases is irrelevant to this case because no contemporaneous sentencing procedure, even those related to Graham's individual characteristics, could make the sentence imposed constitutional. Indeed, any consideration of a juvenile offender's current individual characteristics would contradict the rationale of *Roper*, which rejected the possibility that sentencing juries, even with the guidance of experts, could make accurate predictions of a juvenile's future character. 543 U.S. at 572-573.

II. Sentencing A Juvenile Convicted Of A Non-Homicide Offense To Life Without Parole Violates The Eighth Amendment's Proportionality Principle

A. Juvenile Offenders Under 18 Years Of Age As A Class Are Different From Adult Offenders With Regard To Culpability, Susceptibility To Deterrence, And Potential For Rehabilitation

For more than two decades, this Court has recognized the obvious and fundamental differences

between juveniles and adults when assessing culpability and proportional punishment. *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion) ("[L]ess culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation."); *see also Carey v. Population Servs. Int'l*, 431 U.S. 678, 693 n.15 (1977) (stating the "law has generally regarded minors as having a lesser capability for making important decisions"). More recently, the Court in *Roper* recognized that the "culpability or blameworthiness" of a juvenile offender under 18 years of age "is diminished, to a substantial degree, by reason of youth and immaturity." 543 U.S. at 571. The Court explained that a juvenile's "'irresponsible conduct is not as morally reprehensible as that of an adult.'" *Id.* at 570 (quoting *Thompson*, 487 U.S. at 835).

The Court's conclusions in *Roper* were undergirded by three broad, categorical differences between adults and juveniles: (1) an absence of maturity, (2) an increased susceptibility to external pressures, and (3) a less fixed and more transitory personality. *Id.* at 569-570. The Court concluded that these uncontestable categorical differences are supported by undisputed scientific evidence, the laws of the States, the Court's own jurisprudence, and basic common sense. *Ibid.* Each difference is relevant to the instant case.

1. Compared to adults, juveniles possess less maturity and an underdeveloped sense of responsibility, which often results in impetuous and ill-considered actions and decisions. *Id.* at 569 (citing *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). As the *Roper* Court noted, "adolescents are overrepresented statistically in virtually every category of reckless behavior." *Ibid.* (quoting Jeffrey J. Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339 (1992)).

Behavioral studies of juveniles have verified this psychosocial immaturity. They show that, compared to adults, adolescents are less likely to consider alternative courses of action, understand the perspective of others, or restrain impulses. *See, e.g.*, Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity and Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 Behav. Sci. & L. 741, 756-57 (2000) (finding adolescents less responsible, more myopic, and less able than adults to limit impulsivity and evaluate situations before acting); Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. Applied Developmental Psychol. 257, 268 (2001) (finding that adolescents performed more poorly than adults in study of decision-making competence).

As a group, adolescents value impulsivity, fun-seeking, and peer approval more than adults. *See* Laurence Steinberg, *Adolescence* 88 (6th ed. 2002). It

is statistically normative for adolescents to engage in some form of illegal activity. *See* Terrie E. Moffitt, *Natural Histories of Delinquency in* CROSS-NATIONAL LONGITUDINAL RESEARCH ON HUMAN DEVELOPMENT AND CRIMINAL BEHAVIOR 3, 29 (Elmar G.M. Weitekamp & Hans-Jurgen Kerner eds., 1994). "[I]n laboratory experiments and studies across a wide range of adolescent populations, developmental psychologists [have shown] that adolescents are risk takers who inflate the benefits of crime and sharply discount its consequences, even when they know the law." Jeffrey Fagan, *Why Science and Development Matter in Juvenile Justice*, The American Prospect, Aug. 14, 2005, at 2.

Adolescents are prone to increased risk-taking, in part, because they are not yet competent at the kind of thinking that requires looking into the future to see the result of actions. Mary Beckman, *Crime, Culpability, and the Adolescent Brain*, 305 Science 596 (2004). Levels of planning and thinking about the future increase as adolescents grow older. *See* Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation & Planning*, 11 Developmental. Rev. 1, 29 (1991); Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 Developmental Psychol. 625, 632 (2005).

Given the "comparative immaturity and irresponsibility of juveniles," this Court noted in

Roper that "almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent." 543 U.S. at 569; *see also New Jersey v. T.L.O.*, 469 U.S. 325, 350 n.2 (1985) (Powell, J., concurring) (stating that the law "recognizes a host of distinctions between the rights and duties of children and those of adults"). These prohibitions still exist today.[12] These age-based, legislative classifications are consistent with the conclusion that juvenile offenders under the age of 18 should be deemed less culpable as a class than their adult counterparts for purposes of Eighth Amendment proportionality analysis. "The age of 18 is the point where society draws the line for many purposes between childhood and adulthood." *Roper*, 543 U.S. at 574.

2. Juveniles also are more vulnerable and susceptible than adults to negative influences and outside pressures, including peer pressure. *Id.* at 569.

Peer behaviors are a very important aspect of delinquent involvement by juveniles. *See* Dana L. Haynie, *Friendship Networks and Delinquency: The*

---

[12] As the respondent in *Roper* established, every State but one has established the "age of majority" as 18 or older for unmarried persons. Brief for Respondent, App. A, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633). No state has a voting age younger than 18, *Roper*, 543 U.S. at 579-587, App. B, or permits a person under 18 to serve on a jury, *id.* at App. C. All states but two require a person to be at least 18 in order to marry without parental consent. *Id.* at App. D.

Relative Nature of Peer Delinquency, 18 J. Quantitative Criminology 99, 123 (2002). Indeed, in this case, the sentencing court chastised Graham for subjecting himself to peer influence by his two 20-year-old accomplices in the probation violation. J.A. 268. Juveniles, like Graham, are less responsible than adults for their actions because of the role of peer influence. Research shows that the likelihood of being influenced by peers decreases as one grows older and reaches adulthood. *See* Gardner & Steinberg, *supra*, at 632; Peggy C. Giordano et al., *Changes in Friendship Relations Over the Life Course: Implications for Desistance from Crime*, 41 Criminology 293, 319 (2003). Because of their vulnerability to and lack of control over negative influences in their environment, this Court held in *Roper* that "juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." 543 U.S. at 570.

3. Finally, compared to adults, the character of juveniles is less well-formed and their personality traits are "more transitory, less fixed." *Id.* at 570 (citing Erik H. Erikson, *Identity: Youth and Crisis* (1968)). The Court in *Roper* thus concluded that "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Ibid.*

The irresponsible and transitory conduct of juveniles has a biological basis and thus is not as morally reprehensible as the same conduct by adults.

Recent studies employing brain imaging technology show that adolescents' heightened propensity for risk-taking and poor decision-making correlates with immature cortical brain function. *See, e.g.*, James Bjork et al., *Developmental Differences in Posterior Mesofrontal Cortex Recruitment By Risky Rewards*, 27 J. of Neurosci. 4839 (2007) (comparing differences in brain activity between 12-17-year olds and 23-33-year olds and finding that brain functions associated with decision-making increase from adolescence to adulthood); Neir Eshel et al., *Neural Substrates of Choice Selection in Adults and Adolescents: Development of the Ventrolateral, Prefrontal and Anterior Cingulate Cortices*, 45 Neuropsychologia 1270, 1278 (2007) (when making choices involving risk, adolescents do not engage the prefrontal regulatory brain structures associated with higher thinking and decision-making as much as adults do).

Although the precise neurobiological mechanisms are the subject of continuing research, it now cannot be contested that important aspects of brain maturation, particularly those involved in the brain's executive functions, remain incomplete even in late adolescence. As one commentator has concluded based on review of the current research on adolescent brain development:

> [T]here are clear neurological explanations for the difficulties adolescents have in cognitive functioning, in exercising mature judgment, in controlling impulses, in weighing the consequences of actions, in

> resisting the influence of peers, and in generally becoming more responsible.

Robert Shepherd, *The Relevance of Brain Research to Juvenile Justice,* 19 Crim. Just. 51, 52 (2005).

This biological basis for differences in juvenile conduct provides further support for the conclusion that less culpability should attach to juvenile conduct than to similar conduct by adults. *Cf. Atkins*, 536 U.S. at 318 ("diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others" diminishes the personal culpability of the mentally retarded).

B. Life Without Parole For A Juvenile, Non-Homicide Offense Is Not Justified By Any Legitimate Penological Purpose

The standard policies for criminal sentencing are retribution, rehabilitation, incapacitation, and deterrence. *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in judgment). The Florida Legislature has selected "punishment," *i.e.*, retribution, as its primary sentencing policy, and rehabilitation as a secondary, subordinate sentencing policy. Fla. Stat. § 921.002(1)(b) (2003). Life without parole for a juvenile for a non-homicide is not constitutionally justified under the policies expressly articulated by the Florida Legislature (retribution and rehabilitation) or under the other sentencing

policies not expressed by the Florida Legislature (incapacitation and deterrence).

1. Retribution

The penological goal of retribution does not justify a life-without-parole sentence for juveniles who commit non-homicides. This Court has explained that "[w]hether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult." *Roper*, 543 U.S. at 571. Imposition of "the law's most severe penalty" cannot be proportional when it "is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Ibid.* In *Roper*, this Court concluded that a juvenile who committed a homicide was not sufficiently responsible to get death, the ultimate punishment for a homicide. A juvenile who commits a non-homicide likewise lacks the responsibility to get the ultimate punishment for a non-homicide, life without parole. *See* Barkow, *supra*, at 1179-1180. The lesser responsibility of a juvenile offender undermines any goal of retribution that involves imposing the ultimate punishment for the particular offense committed by him.

2. Rehabilitation and Incapacitation

A life-without-parole sentence, by its nature, rejects any goal of rehabilitating the juvenile offender

and instead embraces the goal of incapacitating the juvenile offender until he dies in prison. As the Eighth Circuit observed in its *Solem* decision later affirmed by this Court:

> A life sentence without parole differs qualitatively from a sentence for a term of years or a life sentence with the prospect of parole. As with the death penalty, the State totally rejects rehabilitation as a basic goal of our criminal justice system by imposing a life sentence without parole.

Helm v. Solem, 684 F.2d 582, 585 (8th Cir. 1982), *aff'd*, 463 U.S. 277 (1983); *see also* Nilsen, *supra*, at 162; Barkow, *supra*, at 1173; *cf. Solem v. Helm*, 463 U.S. 277, 300 (1983) (noting that the purpose of parole is rehabilitative).

A sentence that rejects rehabilitation of a juvenile convicted of a non-homicide offense is both grossly excessive in relation to the crime committed and ignores the uncontestable fact that children are far more malleable and capable of rehabilitation than their adult counterparts. *Roper*, 543 U.S. at 570. An average juvenile's potential for rehabilitation is profoundly greater than that of an adult who has committed a comparable offense. This is so because juvenile criminal conduct is likely to result from "normative experimentation with risky behavior and not from deep-seated moral deficiency reflective of 'bad' character." As a result, "the vast majority of adolescents who engage in criminal or delinquent behavior desist from crime as they mature into

adulthood." Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1011-1012 (2003); *see also* Robert J. Sampson & John H. Laub, *Crime in the Making: Pathways and Turning Points Through Life*, 39 Crime & Delinquency 396 (1993).

3. Deterrence

Because of juveniles' lesser capacities for future orientation and proper consideration of the consequences of their actions, the risk of a life sentence without possibility of parole is unlikely to deter their criminal conduct. As this Court recognized in *Roper*, "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." 543 U.S. at 571.

This reasoning from *Roper* also applies to this case. Life-without-parole sentences do not deter juveniles from committing additional crimes because juveniles are not equipped like adults when it comes to assessing risks. Indeed, researchers have found that the threat or reality of adult criminal punishment through waiver or transfer into the adult criminal justice system has no deterrent effect on misconduct by teen offenders. *See* Dep't of Health & Human Servs., Center for Disease Control Task Force on Community Preventive Services, *Effects on*

Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System, Morbidity & Mortality Weekly Report (Nov. 30, 2007) (reviewing research on effects of transferring juveniles to adult justice system and finding no evidence of general deterrence), *available at* http://www.cdc.gov/mmwr/PDF/rr/rr5609.pdf; Simon I. Singer & David McDowall, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 L. & Soc'y Rev. 521, 529-532 (1988) (measuring New York arrest rates before and after change to require prosecution of some juveniles in criminal court and finding no significant effect); Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 Crime & Delinq. 96, 100-102 (1994) (finding no deterrent effect of Idaho statute mandating criminal processing as adults of juveniles charged with serious offenses); *see generally* Richard E. Redding, U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Juvenile Transfer Law: An Effective Deterrent to Delinquency?* (2008) (summarizing and discussing multiple empirical studies).[13]

---

[13] *Available at* http//www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf. Studies comparing recidivism rates between comparable groups of adolescents processed by either the criminal or juvenile justice systems have shown no significant specific deterrent effect from exposure to the adult criminal justice system. *See* Jeffrey Fagan, *The Comparative Impacts of Juvenile and Criminal Court Sanctions on Adolescent Felony Offenders*, 1 Law & Policy 18,

(Continued on following page)

C. Graham's Life-Without-Parole Sentence Rests On Judicial Reasoning That Contradicts *Roper*'s Rationale And Does Not Reflect A Legislative Judgment

1. Courts lack the expertise, as a matter of judicial discretion, to distinguish between those juveniles who are capable of rehabilitation and being deterred and those who are not

In exercising its discretion, the sentencing court relied on Graham's juvenile misconduct to find that Graham was incapable of either rehabilitation or deterrence. Thus, the court further found, the only penological goal that could be served was to protect the community by incapacitating Graham. *See* J.A. 392-396. These judicial findings cannot be reconciled with *Roper*.

77-119 (1996); *see also* Jeffrey Fagan et al., *Be Careful What You Wish for: Legal Sanctions and Public Safety Among Adolescent Offenders in Juvenile and Criminal Court*, Columbia Law School, Pub. Law Research Paper No. 03-61 (July 2007) (indicating recidivism rates were not generally lower for adolescents in the criminal justice system as opposed to those treated by the juvenile justice system, in a cross-jurisdictional study), *available at* http://ssrn.com/abstract=91202 (click "Download" and select "SSRN"); L. Winner et al., *The Transfer of Juveniles to Criminal Court: Reexamining Recidivism Over the Long Term*, 43 Crime & Delinq. 548, 551-562 (1997) (comparing recidivism rates of comparable adolescent offenders in Florida).

In *Roper*, this Court held that it is impossible to distinguish in a reliable way between the few adolescent offenders who may not be amenable to rehabilitation and the many who will spontaneously desist or respond to sanctions or intervention. 543 U.S. at 572-573. Unlike with adults, a sentencer cannot conclude with any reasonable degree of certainty that "even a heinous crime committed by a juvenile is evidence of irretrievably depraved character," *id.* at 570, or that the juvenile will pose a danger to the community in future years, especially decades after the sentence is imposed. *Id.* at 571-572. The mere passage of time and increasing maturity often reform a juvenile's character deficiencies, as "the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Id.* at 570 (quoting *Johnson*, 509 U.S. at 368). "[A]ny conclusion that a juvenile falls among the worst offenders" is "suspect." *Ibid.*

In fact, even expert psychologists cannot reliably "differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 573 (citing Steinberg & Scott, *supra*, 1014-1016). This is because the observable behavior of different adolescents can be identical in adolescents who will persist as criminal offenders through adulthood and those who will not. *See* John F. Edens et al., *Assessment of "Juvenile Psychopathy" and Its Association with Violence: A*

Critical Review, 19 Behav. Sci. L. 53, 59 (2001) (measures of psychopathy may tap "relatively *normative* and *temporary* characteristics of adolescence rather than deviant and stable personality features").

Because not even trained psychologists or psychiatrists can determine whether the individual character traits of juveniles were signs of "transient immaturity" or "irreparable corruption," 543 U.S. at 572-573, this Court in *Roper* categorically rejected the proposition that the Eighth Amendment permits sentencing juries to determine, on a case-by-case basis, when a sanction as severe as the death penalty is appropriate for a juvenile offender who commits a homicide. Likewise, here, this Court should categorically reject the proposition that the Eighth Amendment permits a sentencing judge to determine, on a case-by-case basis, when a life-without-parole sentence is appropriate for a juvenile offender who commits a non-homicide.

2. Petitioner's life-without-parole sentence is not the result of any legislative judgment that such a sanction should be imposed on a juvenile

There is no support for the proposition that petitioner's sentence in this case reflects the judgment of the Florida Legislature (or that of any state legislature).

a. This Court generally gives greater deference to a legislative judgment to impose a mandatory term for a prison sentence than it does for one that vests substantial discretion to the sentencing judge.

In *Solem*, the Court held that a legislatively *authorized* but discretionary sentence of life imprisonment without parole was subject to significant scrutiny and invalid under the Eighth Amendment. 463 U.S. at 281-282 & n.6, 299 n.26, 303. In *Harmelin*, by contrast, this Court sustained the constitutionality of a legislatively *mandated* sentence of life without parole. In his concurring opinion in *Harmelin*, Justice Kennedy emphasized that, in *Solem*, the Court merely was repudiating the "judgment of a single jurist," not the judgment of a legislature. *Harmelin*, 501 U.S. at 1006 (Kennedy, J., concurring in part and concurring in judgment). "Because a 'lesser sentence . . . could have been entirely consistent with both the statute and the Eighth Amendment,' the Court's decision [in *Solem*] 'd[id] not question the legislature's judgment,' but rather found unconstitutional the sentencing court's selection of a penalty at the top of the authorized sentencing range." *Id.* at 1006-1007 (Kennedy, J., concurring in part and concurring in judgment) (quoting *Solem*, 463 U.S. at 299 n.26).

b. The instant case is more akin to *Solem* than *Harmelin*. By declaring unconstitutional Graham's life-without-parole sentence, the Court will not be repudiating the judgment of the Florida Legislature or any legislature. Instead, it will be repudiating the

judgment of a jurist whose reasoning contradicts this Court's rationale in *Roper*. Although the Florida Legislature authorized the sentencing court to impose the maximum sentence, Fla. Stat. § 921.002(1)(g) (2003), it made rehabilitation a secondary sentencing goal, *id.* § 921.002(1)(b), and instructed that the sentence's severity should be commensurate with the severity of the primary offense (armed burglary in this case) and the offender's prior criminal convictions (none in this case), *id.* § 921.002(1)(c), (d). In addition, the Legislature gave the sentencing court the option of imposing less harsh juvenile and youthful offender sanctions that would have limited Graham's incarceration to no more than six years. *See* pages 6-8, *supra* (Statement A.2.a).

In light of these legislative goals, the Florida Legislature unmistakably chose not to mandate that an offender like Graham be sentenced to life imprisonment without parole for committing an armed burglary. Fla. Stat. § 810.02(1)(b), (2)(a), (b) (2003). Indeed, no state legislature mandates a life-without-parole sentence when a juvenile offender such as Graham commits, as his first offense, an armed burglary. App. A, *infra*.

Rather than being the result of a legislative judgment that the offense he committed requires the severe sanction he received, Graham's sentence is largely the result of an interlocking series of discretionary executive and judicial decisions. In this case, the prosecutor exercised unreviewable discretion to directly file charges against Graham in

adult court, subjecting Graham to the possibility of a life-without-parole sentence, even though she exercised that same discretion to charge one of Graham's accomplices in juvenile court, where life without parole was not an available sentence. J.A. 6-7, 10, 28. Then, the prosecutor, by way of a plea bargain, and the sentencing court, by way of its discretion, eliminated the possibility that Graham would receive the lesser juvenile or youthful offender sanctions that the Florida Legislature permitted for juveniles found guilty in adult court. *See* pages 13-14, 22-23, *supra* (Part B.1.b & B.2.b). Finally, under the adult sentencing regime, the sentencing court exercised its discretion to reject lower sentences permitted by the Florida Legislature and recommended by Florida's executive agencies (48 months recommended by the Department of Corrections and 30 years recommended by the prosecutor's office), and instead chose to impose the maximum sentence, life imprisonment without parole. *See* pages 20-21, *supra* (Part B.2.b).

D. Imprisoning A Juvenile For Life Without Parole For Non-Homicide Offenses Like Armed Burglary Is Cruel When Compared To The Gravity Of The Offense And Unusual Because Most Jurisdictions Rarely, If Ever, Impose Such A Sentence

1. Petitioner's sentence of life without parole for armed burglary satisfies any Eighth Amendment threshold requirement that there be an inference of gross disproportionality

As a "threshold" matter, this Court compares a punishment's harshness with the gravity of the offense that is being punished. *See Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in judgment). There can be little doubt Graham's sentence satisfies this threshold requirement. Both courts and researchers have recognized the common-sense conclusion that life imprisonment without parole is particularly cruel and harsh for a juvenile offender. *See In re Nunez*, 93 Cal. Rptr. 3d 242, 263 (Cal. Ct. App. 2009) ("[T]he harshness of [life imprisonment without parole] is particularly evident 'if the person on whom it is inflicted is a minor, who is condemned to live virtually his entire life in ignominious confinement, stripped of any opportunity or motive to redeem himself for an act attributable to the rash and immature judgment of youth.'") (quoting *People v. Davis*, 633 P.2d 186, 196 n.10 (Cal. 1981) (en banc));

see generally Human Rights Watch/Amnesty Int'l, *The Rest of their Lives: Life Without Parole for Child Offenders in the United States* 52-85 (2005) (*available at* http://www.hrw.org/en/reports/2005/10/11/rest-their-lives-0).

The harshness of such a sentence on a juvenile is particularly difficult to justify with respect to non-homicide offenses, such as the armed burglary in this case, which the Court has recognized are clearly morally less reprehensible than homicide offenses. *See Kennedy*, 128 S. Ct. at 2660 (noting there is a "fundamental, moral distinction between a 'murderer' and a 'robber'" because "while 'robbery is a serious crime deserving serious punishment,' it is not like death in its 'severity and irrevocability'") (quoting *Enmund*, 458 U.S. at 797). The harshest adult punishment (the death penalty) is disproportionate when it is imposed on an adult offender who did not take life, attempt to take life, or intend to take life. *Enmund*, 458 U.S. at 787, 801; *Kennedy*, 128 S. Ct. at 2645-2648, 2660. It logically follows then that the harshest juvenile punishment (life without parole) is disproportionate when it is imposed on a juvenile offender, like Graham, who did not take life, attempt to take life, or intend to take life.[14]

---

[14] Indeed, the threshold inference of gross disproportionality is confirmed by the fact that Graham's punishment under the Federal Sentencing Guidelines would have been 6 to 12 months. U.S. Sentencing Guidelines Manual § 2B2.1 (2008); *see Ewing*, 538 U.S. at 43 (Breyer, J., dissenting) (relying on Guidelines to

(Continued on following page)

Because the threshold comparison between the punishment and the offense "leads to an inference of gross disproportionality," *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in judgment), this Court compares Graham's sentence with punishments imposed within the same jurisdiction and in other American jurisdictions. *See Solem*, 463 U.S. at 291 (noting that it may be "helpful" and "useful" to compare the sentence at issue with (i) "sentences imposed on other criminals in the same jurisdiction" and (ii) "sentences imposed for commission of the same crime in other jurisdictions"); *Ewing*, 538 U.S. at 43 (Breyer, J., dissenting). In addition, this Court has looked to the laws and practices of the international community. *See Roper*, 543 U.S. at 575-576; *Trop*, 356 U.S. at 102-103 (plurality opinion).

2. Graham's sentence is unusual in Florida and far exceeds the average sentences imposed on other Florida offenders for more serious or similar offenses

Graham's sentence of life without parole for his armed burglary conviction is unusual in Florida. It far exceeds the average sentences imposed on other

---

determine that "threshold" test of gross disproportionality had been satisfied); *United States v. Bajakajian*, 524 U.S. 321, 338-339 (1998) (relying on Guidelines to determine that fine was grossly disproportionate under Eighth Amendment's Excessive Fines clause).

Florida offenders for more serious or similar offenses. "If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." *Solem*, 463 U.S. at 291; *see also Ewing*, 538 U.S. at 43 (Breyer, J., dissenting) (reviewing average sentences served as part of comparative analysis).

Florida's Department of Corrections reports the following average prison times to be served by Florida offenders—both adult and juvenile—admitted in fiscal year 2003-2004:[15]

---

[15] Fla. Dep't of Corrs., Bureau of Research and Data Analysis, *Time Served by Criminals Sentenced to Florida's Prisons: The Impact of Punishment Policies from 1979 to 2004*, § 2, Charts 6, 9, 10, 11, 17, 25 (Aug. 2004) (*available at* http://www.dc.state.fl.us/pub/timeserv/annual/index.html). For its August 2004 report, the Department relied on natural life expectancy tables to calculate the average prison times to be actually served. *See* Fla. Dep't of Corrs., Bureau of Research and Data Analysis, *supra*, Methodology Section n.5 (*available at* http://www.dc.state.fl.us/pub/timeserv/annual/index.html) (click on "Methodology"). Based on natural life expectancy tables, Graham will spend approximately 60 years in prison. *See* U.S. Census Bureau, 2009 Statistical Abstract, Table 103 (*available at* www.census.gov/compendia/statab/cats/births_deaths_marriages_divorces/life_expectancy.html). Because a more recent 2007-08 annual report does not show the average prison time for armed burglary (Graham's offense), petitioner relies on the data from the 2003-2004 fiscal year that appears in the August 2004 report.

Offense	Average Prison Time to Be Served by All Offenders (Adult and Juvenile) Admitted in Fiscal Year 2003-04
All Violent Crimes	7.1 years
Murder	26.9 years
Second Degree Murder	21.6 years
Murder/Manslaughter	20.5 years
Armed Robbery	10.1 years
Armed Burglary	8.4 years

Thus, compared to other Florida offenders (adult and juvenile combined), Graham's sentence for his armed burglary conviction is: (i) 8.5 times greater than the average sentence for all violent offenders; (ii) 7.1 times greater than the average sentence for offenders convicted of armed burglary; (iii) 5.9 times greater than the average sentence for offenders convicted of armed robbery; and (iv) 2.2 times greater than the average sentence for offenders convicted of a murder.

Graham's sentence is also unusual when compared solely with Florida juvenile offenders. Florida's Department of Corrections reports the following sentences for juvenile offenders admitted the same fiscal year as Graham (FY 2005-2006).[16]

---

[16] Fla. Dep't of Corrs., *2005-2006 Annual Report: The Online Guidebook to the Florida Prison System* 24 (*available at* http://www.dc.state.fl.us/pub/annual/0506/stats/ia_youthful.html) (last

(Continued on following page)

Offense	Number of Juvenile Offenders	Average Sentence Length in Years	Average Age at Offense
Murder, Manslaughter	95	19.8	16.5
Robbery	275	7.4	16.8
Violent Personal Offenses	219	5.2	16.8
Burglary	299	5.0	16.9

Therefore, looking only at juvenile offenders within Florida, Graham's sentence for his armed burglary conviction is: (i) 9.6 times greater than the average sentence for burglary; (ii) 6.8 times greater than the average sentence for robbery and violent personal offenses; and (iii) 2.5 times greater than the average sentence for homicides.

And Graham is one of only 77 juvenile, non-homicide offenders in Florida currently serving a life-without-parole sentence. Paolo G. Annino, David W. Rasmussen, and Chelsea B. Rice, *Juvenile Life without Parole for Non-Homicide Offenses:*

---

visited June 30, 2009). For purposes of calculating the average sentences, the Department used 50 years for any sentence of death, life, and terms of imprisonment of 50 years or longer. We use the same measurement when comparing Graham's sentence to other juvenile offenders.

Florida Compared to the Nation 2, Table A (2009) (*available at* http://www.law.fsu.edu/faculty/profiles/annino/Report_JuvenileLifeSentence.pdf.) These 77 juvenile, non-homicide offenders—who have been admitted to Florida's adult prison system over the last quarter century—are a miniscule portion of the juvenile offenders in Florida's adult prisons. By comparison, in just the five most recently reported years, Florida has admitted over 6,800 juvenile offenders into its adult prison system, and over 5000 of these juvenile offenders have committed crimes comparable to or more serious than Graham's armed burglary charge.[17] In addition, Florida's Department of Juvenile Justice reports that burglary is the felony offense committed most often by juveniles, as there were 24,495 juvenile burglary referrals to the Department during the two most recent fiscal years. *See* http://www.djj.state.fl.us/Research/Trends.html (last visited July 15, 2009).

---

[17] Every fiscal year, the Florida Department of Corrections issues an annual report, called The Online Guidebook to the Florida Prison System. These reports are available at http://www.dc.state.fl.us/pub/index.html (last visited July 2, 2009). The information on juvenile inmate admissions can be found in each report under the "Inmate Admissions" tab. The reports reveal that, in the last five reported fiscal years (2003-2008), 6830 juvenile offenders have been admitted to Florida's adult prisons, and 5021 of these offenders committed burglary, robbery, violent personal offenses, homicides, sexual offenses, or crimes involving weapons.

Florida permits life-without-parole sentences for offenses far more serious than armed burglary, such as pre-mediated murder, facilitating terrorism, and the unlawful manufacturing, sale, or delivery of weapons of mass destruction. *See* Fla. Stat. §§ 775.31(1)(e), 782.04(1)(a)(1), (b), 790.166(2) (2003); note 5, *supra*. Furthermore, a life-without-parole sentence is not authorized for other offenses that are at least just as serious as armed burglary. *See, e.g., id.* §§ 784.045(1)(a)(2), 775.082(3)(c) (15-year maximum for aggravated battery while using a deadly weapon); *id.* § 782.07(2), (3), 775.082(3)(b) (30-year maximum for aggravated manslaughter of a juvenile or elderly person); *id.* § 794.011(4)(e), 775.082(3)(b) (30-year maximum for sexual battery on a mentally defective victim who is 12 years old or older).

3. Comparison of Graham's sentence to the sentences for juvenile offenders in other American jurisdictions demonstrates that his sentence is unusual both in theory and practice

Graham's offense conduct—an armed burglary with an assault or battery and without any prior convictions—would subject him to a life-without-parole sentence in only two States: Florida and South Carolina. App. A, *infra*. However, for this offense conduct, South Carolina has not actually imprisoned any juvenile offender; only Florida has done so. Annino, *supra*, at 8, Chart C. Thus, Graham's case is

analogous to *Solem*. There, only two States permitted a life-without-parole sentence for the offense conduct at issue, and only one State actually had imposed such a sentence for the offense conduct. 463 U.S. at 299-300; *cf. Enmund*, 458 U.S. at 793-794 (looking to conduct of sentencing juries, as well as legislative enactments, in determining whether sentence was proportional).

In an additional 15 jurisdictions, Graham's offense conduct would subject him to a life-without-parole sentence *if* he had a prior conviction, and in 14 of these 15 jurisdictions, at least two prior convictions would be required. App. B, *infra*. Graham had no convictions prior to his armed burglary offense, and thus, in none of these 15 jurisdictions would his offense conduct subject him to a life-without-parole sentence.

Significantly, there are no known juvenile offenders, outside of Florida, serving a life-without-parole sentence for any type of burglary offense (Graham's offense), or for any type of robbery, carjacking, or battery offense. Annino, *supra*, at 8, Chart C; *see* note 18, *infra*. Indeed, there are only 106 juvenile, non-homicide offenders in the Nation serving a life-without-parole sentence. Annino, *supra*, at 2, Table A; *see* note 18, *infra*. Seventy-seven of these 106 juvenile offenders (approximately 70%) are imprisoned in Florida. Annino, *supra*, at 2-3. The 29 offenders outside of Florida were imprisoned for either sexual battery or kidnapping offenses; by comparison, the 77 Florida

offenders were imprisoned for a wide variety of offenses. *See id.* at 8, Chart C.

Moreover, very few States have actually imposed life-without-parole sentences on juvenile, non-homicide offenders. All the known juvenile, non-homicide offenders in the Nation are concentrated in only five States besides Florida. *Id.* at 2, Table A. These five states have imprisoned far fewer juvenile, non-homicide offenders compared to the 77 such offenders imprisoned in Florida: Louisiana—17; Iowa—6; California—4; Nebraska—1; South Carolina—1. *Id.* at 5-6, Table A.[18] The authors of a recent study have confirmed that 36 States do not impose life-without-parole sentences on any juvenile non-homicide offenders. *Id.* at 2, 5-6, Table A. For seven other States, the authors have requested data, and their requests have been denied or are outstanding; the authors will update their study upon receipt of additional data. *Id.* at 3-4 & n.7, App. II. Therefore, while in theory a number of jurisdictions in the Nation permit life-without-parole sentences for a juvenile's non-homicide offense,[19] only a handful of

---

[18] The study lists Mississippi as a State that currently imprisons 5 persons sentenced to life without parole for juvenile non-homicide offenses. Inclusion of Mississippi in this list is misplaced because Mississippi also allows inmates convicted of non-homicides to be eligible for "early" release once they have reached age 65 and have served fifteen years of their sentence. *See* Miss. Code Ann. § 47-5-139(1)(a).

[19] Thirty-six States, along with the federal government and the District of Columbia, appear to legally permit

(Continued on following page)

jurisdictions, in practice, actually impose such a sentence on juvenile offenders for non-homicide offenses, and Florida does so far more often. *Id.* at 5-6, Table A.

Most States generally reserve the severe punishment of life without parole for juvenile offenders who commit the most serious offenses—that is, homicides. Compared to other States that actually sentence juvenile offenders for life without parole, Florida imposes this sentence on non-homicide offenders, rather than homicide offenders, at significantly higher rates than other States do. *Id.* at 6-7, Table B. According to a more dated 2005 study, almost 93% of the juvenile offenders sentenced to life without parole in the nation were convicted of a homicide. Human Rights Watch/Amnesty Int'l, *supra*, at 27.

4. Graham's sentence is unusual in that it would not be imposed anywhere else in the world

According to a 2008 survey, only ten nations, besides the United States, permit juveniles to be imprisoned for life without parole, and none of these ten nations do so in practice. Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in*

---

life-without-parole sentences for some types of juvenile, non-homicide offenses. App. C, *infra*. *See* note 18, *supra*, for explanation as to why Mississippi is not included in Appendix C.

Prison: Global Law and Practice, 42 U.S.F. L. Rev. 983, 989-990 & nn.18 & 20 (Aug. 2008).[20]

International treaties prohibit imprisoning juveniles for life without parole. Article 24(1) of the International Covenant on Civil and Political Rights, which was signed and ratified by the United States, requires that every child have "the right to such measures of protection as are required by his status as a minor." G.A. Res. 2200A, Art. 24(1), U.N. GAOR, 16th Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976). The United Nations Human Rights Committee has held "that sentencing children to life sentence without parole is of itself not in compliance with article 24(1) of the Covenant." U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, ¶ 34, U.N. Doc. CCPR/C/USA/CO/3 (Sept. 15, 2006). Moreover, 185 nations in the United Nations General Assembly voted in favor of resolutions calling for nations to abolish the practice of imprisoning juveniles for life without parole; only the United States voted in

---

[20] The ten nations are Antigua, Barbuda, Argentina, Australia, Belize, Brunei, Cuba, Dominica, Saint Vincent and Grenadines, the Solomon Islands, and Sri Lanka. The 2008 study cited in the text updates the information and research from the 2005 study cited in the petition for *certiorari*, which indicated that 14 nations allowed juveniles to be imprisoned for life without parole.

opposition. De la Vega & Leighton, *supra*, at 989 & n.19.

Imprisoning juveniles for life without parole is also contrary to the standards of a widely-accepted international treaty relied upon by this Court in *Roper*. 543 U.S. at 576; *see id.* at 543 U.S. at 623 (Scalia, J., dissenting). Article 37(a) of the United Nations Convention on the Rights of the Child ("CRC") prohibits not only sentencing juveniles to death, but also sentencing juveniles to "life imprisonment without the possibility of release." United Nations Convention on Rights of the Child, Art. 37(a), U.N. Doc. A/44/736, 28 I.L.M. 1456, 1470 (Nov. 20, 1989). The CRC has been ratified by 192 nations; only the United States and Somalia have not ratified it. Human Rights Watch/Amnesty Int'l, *supra*, at 99 & nn.291-293.

CONCLUSION

For the reasons set forth above, this Court should reverse the judgment of the Florida First District Court of Appeal with instructions to vacate petitioner's life-without-parole sentence, and remand the case for further proceedings.

Respectfully submitted,

DREW S. DAYS, III
BRIAN R. MATSUI
SETH M. GALANTER
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, D.C. 20006

GEORGE C. HARRIS
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105

BRYAN S. GOWDY
Counsel of Record
JOHN S. MILLS
REBECCA BOWEN CREED
JESSIE L. HARRELL
MILLS CREED & GOWDY, P.A.
865 May Street
Jacksonville, FL 32204
(904) 350-0075

Attorneys for Petitioner

July 16, 2009

APPENDIX A

JURISDICTIONS PERMITTING A LIFE-WITHOUT-PAROLE SENTENCE FOR A BURGLARY CONVICTION BY A JUVENILE OFFENDER WITHOUT ANY PRIOR CONVICTIONS

	State	Statute(s)
1.	Florida	Fla. Stat. §§ 985.56(1) (child of any age subject to life without parole); 810.02 (burglary subject to life sentence); 921.001(10) (life sentences ineligible for parole).
2.	South Carolina	S.C. Code §§ 63-19-1210(5) (juvenile 14 or older may be tried as adult for serious felonies); 16-11-311(B) (first degree burglary carries sentence of life without parole).

APPENDIX B

JURISDICTIONS PERMITTING A LIFE-WITHOUT-PAROLE SENTENCE FOR A BURGLARY CONVICTION BY A JUVENILE OFFENDER WITH PRIOR CONVICTIONS

	State	Offense Number	Statute(s)
1.	Alabama	4	Ala. Code §§ 13A-3-3 (must be older than 14 for criminal responsibility); 13A-5-9(c)(3), (4) (certain recidivist offenders subject to life without parole); 13A-7-5(b) (first degree burglary subject to recidivist statute).
2.	California	4	Cal. Penal Code §§ 26 (under 14 not criminally responsible unless clear proof that juvenile knew of wrongfulness); 667.7(a), (a)(2) (life-without-parole sentence for recidivist offenders if fourth felony uses force likely to result in great bodily injury).
3.	Delaware	3	Del. Code tit. 10, § 1010(a) (child may be treated as adult in some circumstances); Del. Code tit. 11, § 4214(b) (life without parole if third

			felony conviction is for burglary in the first or second degree).
4.	District of Columbia	3	D.C. Code §§ 16-2307 (possible referral to district court if juvenile has committed act that would be felony if committed by adult); 22-1804a(a)(2) (subject to life-without-parole sentence under recidivist statute for, *inter alia*, burglary).
5.	Florida	1	Fla. Stat. §§ 985.56(1) (child of any age subject to life without parole); 810.02(2) (burglary subject to life sentence); 921.001(10)(b) (life sentences ineligible for parole).
6.	Indiana	3	Ind. Code Ann. §§ 31-30-3-6(2) (juvenile court must refer to district court if recidivist offender); 35-50-2-8.5(a) (life-without-parole sentence for recidivist offenders for certain crimes, including burglary with a dangerous weapon or resulting in serious bodily injury).

7.	Louisiana	3	La. Child Code art. 857(A) (child charged with certain crimes may be transferred to district court); La. Rev. Stat. § 15:529.1(A) (life-without-parole sentence for third felony if crime of violence, which includes burglary with a dangerous weapon).
8.	Maryland	4	Md. Code Ann., Cts. & Jud. Proc. § 3-8A-03(d)(1) (juvenile court has no jurisdiction over case where offense by juvenile 14 or older would be punishable by death or life imprisonment if committed by adult); Md. Code Ann., Crim. Law §§ 14-101(c)(1) (life-without-parole sentence for conviction for fourth crime of violence); 14-101(a)(14) (crime of violence includes commission of any felony with the use of handgun).
9.	North Carolina	3	N.C. Gen. Stat. §§ 7B-2200 (juvenile 13 or older may be tried as adult); 14-7.7 (third violent felony conviction results in violent habitual felon

			status; violent felonies are class A-E felonies); 14-7.12 (violent habitual felons sentenced to life without parole); 14-52 (burglary in first degree is a class D felony).
10.	Pennsylvania	3	42 Pa. Cons. Stat. §§ 6355(a) (transfer to district court if juvenile was 14 or older at time of act and the act would have been a felony if committed by an adult); 9714(a)(2), (g) (life-without-parole sentence for third violent felony conviction; violent felony includes certain type of burglary).
11.	Rhode Island	3	R.I. Gen. Laws §§ 14-1-7(c) (anyone under 18 can be charged as adult for committing felony punishable by life in prison); 11-47-3.2 (possible life without parole for third conviction for using a firearm to commit a crime of violence); 11-47-2(2) (burglary is a crime of violence).
12.	South Carolina	1	S.C. Code §§ 63-19-1210(5) (juvenile 14 or older may

			be tried as an adult for serious felonies); 16-11-311(B) (first degree burglary carries life-without-parole sentence).
13.	South Dakota	4	S.D. Codified Laws §§ 22-3-1(1) (children younger than 10 are incapable of committing crime); 26-11-3.1 (child 16 or older charged with Class A, B, or C felony must be tried as an adult); 22-6-1(3) (Class C felony can carry life sentence); 24-15-4 (life sentences are ineligible for parole); 22-7-8, (fourth felony conviction can result in life sentence).
14.	Tennessee	2	Tenn. Code Ann. §§ 37-1-134 (juvenile court may transfer case to district court if child 16 or under committed enumerated felonies); 40-35-120(g) (repeat violent offenders, which includes offense of especially aggravated burglary, are subject to life-without-parole sentence).

15.	Utah	3	Utah Code Ann. §§ 76-2-301 (juveniles not criminally responsible if younger than 14); 78A-6-703(7) (juvenile court has discretion to transfer case to district court); 76-3-203.5 (habitual violent offenders sentenced to life without parole; burglary is an enumerated violent felony).
16.	Washington	3	Wash. Rev. Code §§ 9A.04.050 (juveniles under 8 are not criminally responsible); 13.40.110 (juvenile court may transfer case of juvenile 8 or older to district court); 9.94A.570 (recidivism for class A offenses results in life-without-parole sentence); 9A.52.020 (burglary is a Class A felony).
17.	Wisconsin	3	Wis. Stat. §§ 938.183(t) (district court has exclusive jurisdiction of juvenile that committed assault or battery on certain law enforcement officials); 939.62(2m)(b)(1), (c) (recidivism statute

results in life-without-parole sentence for third serious felony); 939.62(2m)(a)(2m)(b) (burglary is a serious felony).

APPENDIX C

JURISDICTIONS PERMITTING A LIFE-WITHOUT-PAROLE SENTENCE FOR JUVENILE OFFENDERS CONVICTED OF NON-HOMICIDE OFFENSES

	State	Statute(s)
1.	Alabama	Ala. Code §§ 13A-3-3 (must be older than 14 for criminal responsibility); 13A-5-9(c)(3)-(4) (Class A recidivist offenders subject to life without parole); 13A-6-43(c) (kidnapping subject to recidivist statute).
2.	Arkansas	Ark. Code Ann. §§ 9-27-318(b) (possible transfer to criminal court for rape offense if 14 or older); 5-4-501(c)(3) (life without parole if rape is second serious felony offense).
3.	California	Cal. Penal Code §§ 26 (under 14 not criminally responsible unless clear proof that juvenile knew of wrongfulness); 667.7(a)(2) (life-without-parole sentence for recidivist offenders for variety of offenses).
4.	Delaware	Del. Code tit. 10, § 1010(a) (child may be treated as adult in some circumstances); Del. Code tit. 11, § 773(c) (life without parole for first degree rape in some circumstances).

5.	District of Columbia	D.C. Code §§ 16-2307(a) (possible referral to district court if juvenile 15 or older has committed act that would be felony if committed by adult); 22-1804a(a)(2) (subject to life-without-parole sentence under recidivist statute for, *inter alia*, burglary).
6.	Florida	Fla. Stat. §§ 985.56(1) (child of any age subject to life without parole); 810.02(2) (burglary subject to life sentence); 921.001(10)(b) (life sentences ineligible for parole).
7.	Georgia	Ga. Code Ann. §§ 16-3-1 (younger than 13 not criminally responsible); 16-6-1(b) (may receive life-without-parole sentence for rape conviction).
8.	Idaho	Idaho Code §§ 20-508 (juvenile court may transfer case to district court for enumerated offenses); 18-6104 (rape conviction can carry life-without-parole sentence); 19-2513 (court has discretion to impose a determinate sentence of life, which means no parole).
9.	Illinois	705 Ill. Comp. Stat. Ann. § 405/5-130(4)(c)(ii) (juvenile may be sentenced under adult criminal code); 730 Ill. Comp. Stat. Ann. § 5/5-8-1(a)(2.5) (second conviction for aggravated criminal sexual assault results in

	determinate sentence for natural life).
10. Indiana	Ind. Code Ann. §§ 31-30-3-6(2) (juvenile court must refer to district court if recidivist offender); 35-50-2-8.5(a) (life-without-parole sentence for recidivist offenders for certain crimes).
11. Iowa	Iowa Code §§ 232.45(1), (6) (juvenile court may transfer case to district court for certain offenses committed by juvenile 14 or older); 710.2 (kidnapping in first degree is Class A felony); 902.1 (Class A felony carries life-without-parole sentence).
12. Louisiana	La. Child. Code Ann. art. 857(A) (a child charged with certain crimes may be transferred to district court); La. Rev. Stat. § 14:44 (aggravated kidnapping carries sentence of life without parole).
13. Maryland	Md. Code Ann., Cts. & Jud. Proc. § 3-8A-03(d)(1) (juvenile court has no jurisdiction over case where offense by juvenile 14 or older would be punishable by death or life imprisonment if committed by adult); Md. Code Ann., Crim. Law § 3-303(d)(2) (rape in first degree carries life-without-parole sentence).
14. Michigan	Mich. Comp. Laws §§ 712A.2(a)(1) (family court lacks jurisdiction

	over case where juvenile 14 or older commits offense that would be felony if committed by adult); 333.7413(1) (recidivist controlled substances offenses subject to life without parole).
15. Minnesota	Minn. Stat. §§ 260B.125(1) (juvenile court may transfer case to district court if juvenile is 14 or older and committed an offense that would be felony if committed by adult); 609.3455(2)(a) (life-without-parole sentence if criminal sexual conduct in the first or second degree is committed and two or more heinous elements exist).
16. Missouri	Mo. Rev. Stat. §§ 211.071(1) (juvenile court may transfer case to district court if juvenile is 12 or older and committed an offense that would be felony if adult had committed it); 558.018(3) (life-without-parole sentence for recidivist sexual offenders).
17. Montana	Mont. Code Ann. §§ 41-5-206(1)(a) (county attorney may refer 12-15 year old's juvenile case to district court for enumerated offenses); 46-18-219 (recidivist sexual offenses result in life-without-parole sentence).
18. Nebraska	Neb. Rev. Stat. §§ 43-247 (criminal court has jurisdiction over juvenile

		that has committed felony); 28-313 (kidnapping is IA felony); 28-105 (IA felony carries life-without-parole sentence).
19.	Nevada	Nev. Rev. Stat. §§ 62B.330(d) (juvenile court does not have jurisdiction over juvenile that commits felony on school grounds resulting in substantial bodily harm); 194.010(1) (juvenile under age of 8 is not criminally responsible); 193.1685(3) (felony resulting in substantial bodily harm to victim committed with requisite intent may receive life-without-parole sentence).
20.	New Hampshire	N.H. Rev. Stat. Ann. §§ 628:1(I) (children 13 and older may be held criminally responsible); 169-B:24(II) (juveniles 13 or older may be tried as adults for certain felonies); 651:6 (recidivist statute imposes life without parole for some offenses).
21.	New Jersey	N.J. Stat. §§ 2A:4A-26 (juvenile court may transfer case to district court if juvenile is 14 or older and committed an enumerated felony); 2C:43-7.1(a) (life-without-parole sentence for third conviction of enumerated offenses under recidivist statute).

22.	New York	N.Y. Penal Code §§ 30.00(1)-(2) (juvenile under 16 cannot be criminally responsible for offenses with life-without-parole sentence); 490.25 (juvenile may be convicted of terrorism charges); 60.06 (terrorism charges can result in life-without-parole sentence).
23.	North Carolina	N.C. Gen. Stat. §§ 7B-2200 (juveniles 13 or older may be tried as adult); 15A-1340.16B(a) (life-without-parole sentence for second conviction of first degree rape).
24.	North Dakota	N.D. Cent. Code §§ 12.1-04-01 (juvenile may not be prosecuted as an adult if committed offense when younger than 14); 12.1-20-03 (offense of gross sexual imposition is a Class AA felony); 12.1-32-01(1) (Class AA felony subject to life-without-parole sentence).
25.	Ohio	Ohio Rev. Code §§ 2152.10(B) (discretionary transfer to district court if juvenile 14 or older committed what would be felony for adult); 2907.02(B) (particular circumstances surrounding offense of rape in the first degree can result in life-without-parole sentence).
26.	Oklahoma	Okla. Stat. tit. 10, §§ 7306-2.6 (may be designated a youthful offender if aged 15 and commit an enumerated offense); 7306-2.8

		(youthful offender may be sentenced as adult); Okla. Stat. tit. 21, § 1115 (rape in first degree may receive life-without-parole sentence).
27.	Pennsylvania	42 Pa. Cons. Stat. § 6355(a) (transfer to district court if juvenile was 14 or older at time of act and act would have been felony if committed by adult); 18 Pa. Cons. Stat. § 3121(e)(2) (possible life imprisonment for rape of child under 13 that results in serious bodily injury); 61 Pa. Cons. Stat. § 331.21(a) (parole not available to those serving life sentences).
28.	Rhode Island	R.I. Gen. Laws §§ 14-1-7(c) (anyone under 18 can be charged as an adult for committing felony punishable by life in prison); 11-47-3.2 (possible life without parole for third conviction for using a firearm to commit a crime of violence).
29.	South Carolina	S.C. Code §§ 63-19-1210(5) (juvenile 14 or older may be tried as adult for serious felonies); 16-11-311(B) (first degree burglary carries life-without-parole sentence).
30.	South Dakota	S.D. Codified Laws §§ 22-3-1(1) (children younger than 10 are incapable of committing crime); 26-11-3.1 (child 16 or older

	charged with Class A, B, or C felony must be tried as an adult); 22-19-1 (kidnapping is Class C felony); 22-6-1(3) (Class C felony can carry life-without-parole sentence); 24-15-4 (life sentences are ineligible for parole).
31. Tennessee	Tenn. Code Ann. §§ 37-1-134 (juvenile court may transfer case to district court if child 16 or older committed enumerated felonies); 40-35-120(g) (repeat violent offenders are subject to life-without-parole sentence).
32. Utah	Utah Code Ann. §§ 76-2-301 (juveniles not criminally responsible if younger than 14); 78A-6-703(7) (juvenile court has discretion to transfer case to district court); 76-5-302(3)(b)-(c) (aggravated kidnapping that causes serious bodily injury can result in life-without-parole sentence).
33. Virginia	Va. Code Ann. §§ 16.1-269.1(A) (juvenile court may transfer case to district court if offense by juvenile 14 or older would be felony if committed by adult); 53.1-151(B1) (recidivism for certain offenses results in life-without-parole sentence).
34. Washington	Wash. Rev. Code §§ 9A.04.050 (juveniles under 8 are not

	criminally responsible); 13.40.110 (juvenile court may transfer case of juvenile 8 or older to district court); 9.94A.570 (recidivism for class A offenses results in life-without-parole sentence).
35. West Virginia	W. Va. Code §§ 49-5-10(e) (juvenile court has discretion to transfer juveniles 14 or younger to district court); 61-2-14a(a) (conviction for kidnapping carries life-without-parole sentence).
36. Wisconsin	Wis. Stat. §§ 983.183(t) (district court has exclusive jurisdiction of juvenile that committed assault or battery on certain law enforcement officials); 939.62(2m)(c) (recidivism statute results in life-without-parole sentence).
37. Wyoming	Wyo. Stat. §§ 14-6-237 (juvenile court has discretion to transfer case to district court if juvenile is 13 or older); 6-2-306(d) (recidivism for certain sexual offenses results in a sentence of life without parole).
38. Federal	18 U.S.C. §§ 5032 (juvenile aged 13 can be transferred to district court and tried as an adult under certain circumstances); 3559(c)(1) (recidivism statute subjects one to life-without-parole sentence).

RESPONDENT'S BRIEF

(18)

Supreme Court, U.S.
FILED
SEP 14 2009
OFFICE OF THE CLERK

No. 08-7412

In the Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writ of Certiorari to the District Court of Appeal, First District of Florida

---

BRIEF OF RESPONDENT

BILL MCCOLLUM
Attorney General of Florida
Scott D. Makar
Solicitor General
Counsel of Record
Louis F. Hubener
Chief Deputy Solicitor General
Timothy D. Osterhaus
Craig D. Feiser
Courtney Brewer
Ronald A. Lathan
Deputy Solicitors General
PL-01, The Capitol
Tallahassee, Florida 32399-1050
850-414-3300
850-410-2672 fax
Counsel for State of Florida

QUESTION PRESENTED

Whether the Eighth Amendment's ban on cruel and unusual punishments prohibits the imprisonment of a juvenile for life without the possibility of parole as punishment for the juvenile's commission of a non-homicide.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. History and Background of Florida's Response to Escalating Violent Crime. 1

B. Graham's First Violent Offenses: Armed Burglary with Assault or Battery and Attempted Armed Robbery 6

C. Graham's "Second Chance" on Probation: Escalating Violent Criminal Conduct a Month Shy of His Eighteenth Birthday. 7

D. Graham's Violation of Probation and Sentencing Hearings 10

E. Graham's State Appeal. 15

SUMMARY OF THE ARGUMENT 18

ARGUMENT 22

I. This Court's Eighth Amendment Jurisprudence Supports a Life Sentence Without Parole for Violent Juvenile Offenses, Even When a Victim of the Offense Does Not Die 23

A. Under general Eighth Amendment principles that apply to incarceration cases, Graham's sentence is not grossly disproportionate to his offense 23

B. Graham's comparative analysis is seriously flawed. 32

C. International comparisons are unnecessary.....42

II. *Roper* Does Not Alter This Court's Non-Capital Precedents, Particularly Given That Age is Woven into State Criminal Justice Systems, the Deference to State Sovereignty in Sentencing Matters, and the Unworkability of a Categorical Rule.. 44

A. *Roper*'s elimination of the death penalty for juveniles does not also eliminate harsh prison sentences for juveniles. 44

B. Age, as a characteristic of the offender, is already woven deeply into the fabric of state criminal justice systems.....50

C. The structure of state sentencing laws must be flexible and allow states to pursue methods that best address serious crime problems. 57

D. The categorical rule suggested by Graham in the Question Presented is unworkable.....60

CONCLUSION 63

TABLE OF AUTHORITIES

CASES

Atkins v. Virginia,
536 U.S. 304 (2002) 42, 48

Calderon v. Schribner,
2009 WL 89279 (E.D. Cal. Jan. 12, 2009) 39, 46

Caldwell v. Mississippi,
472 U.S. 320 (1985) 45

Cobos v. Dennison,
825 N.Y.S.2d 332 (N.Y. App. Div. 2006).....46

Ewing v. California,
538 U.S. 11 (2003) .....*passim*

Ford v. Wainwright,
477 U.S. 399 (1986) 45

Furman v. Georgia,
408 U.S. 238 (1972) 45, 46, 47, 48

In re Gault,
387 U.S. 1 (1967) 51, 52

Graham v. State,
982 So. 2d 43 (Fla. Dist. Ct. App. 2008) 43, 49

Harmelin v. Michigan,
501 U.S. 957.....*passim*

Hawkins v. Hargett,
200 F.3d 1279 (10th Cir. 1999) 39, 61

Hutto v. Davis,
454 U.S. 370 (1982) 24, 25

In re Nunez,
93 Cal. Rptr. 3d 242 (Cal. Ct. App. 2009).....46

Johnson v. Texas,
509 U.S. 350 (1993) 42

Kennedy v. Louisiana,
128 S. Ct. 2641 (2008) 47, 48

Lockyer v. Andrade,
538 U.S. 63 (2003) 23, 28, 31

Oregon v. Ice,
129 S. Ct. 711 (2009) 59

Roberson v. Fla. Parole & Probation Comm'n,
444 So. 2d 917 (Fla. 1983).....62

Roper v. Simmons,
543 U.S. 551 (2005) .....*passim*

Rummel v. Estelle,
445 U.S. 263 (1980) .....*passim*

Solem v. Helm,
463 U.S. 277 (1983) .....*passim*

Stanford v. Kentucky,
492 U.S. 361 (1989) 42, 51

State v. Cain,
381 So. 2d 1361 (Fla. 1980) 55

State v. Green,
502 S.E.2d 819 (N.C. 1998) 39, 53, 54

State v. Ira,
43 P.3d 359 (N.M. 2002) 39

State v. Ninham,
767 N.W.2d 326 (Wisc. Ct. App. 2009) 46

State v. Pittman,
647 S.E.2d 144 (S.C. 2007) 50

State v. Standard,
569 S.E.2d 325 (S.C. 2002) 39

State v. Warren,
887 N.E.2d 1145 (Ohio 2008) 39

Trop v. Dulles,
356 U.S. 86 (1958) 42

United States v. Feemster,
483 F.3d 583 (8th Cir. 2007) 46

STATUTES

1993 Fla. Laws, Ch. 93-403 3

1993 Fla. Laws, Ch. 93-416 3

1994 Fla. Laws xviii 3

1994 Fla. Laws, Ch. 94-209 3

Ariz. Rev. Stat. § 13-1423(B) 37

Fla. Stat. § 39.002(1)(c) (1995) 3

Fla. Stat. § 39.0587(1)(e) (1995) 3

Fla. Stat. § 499.0051(10) 32

Fla. Stat. § 775.082(3)(c) 35

Fla. Stat. § 775.082(3)(d) 35

Fla. Stat. § 775.0823 32

Fla. Stat. § 775.0823(8) 32

Fla. Stat. § 775.084(4)(a) 32

Fla. Stat. § 775.085(1) 32

Fla. Stat. § 775.0861 32

Fla. Stat. § 775.087 32

Fla. Stat. § 775.0875(2) 32

Fla. Stat. § 775.31(1)(e) 32

Fla. Stat. § 777.04(1) 7

Fla. Stat. § 782.04 32

Fla. Stat. § 782.051(1) 32

Fla. Stat. § 787.01 32

Fla. Stat. § 787.02 32

Fla. Stat. § 790.16(1) 32

Fla. Stat. § 790.161 32

Fla. Stat. § 790.166(2) 32

Fla. Stat. § 790.23(4) 32

Fla. Stat. § 794.011 32

Fla. Stat. § 794.023 32

Fla. Stat. § 810.02(2) 6-7, 32

Fla. Stat. § 812.13(2)(a) 33

Fla. Stat. § 812.13(2)(b) 7

Fla. Stat. § 812.133(2)(a) 33

Fla. Stat. § 812.135(2)(a) 33

Fla. Stat. § 817.487 33

Fla. Stat. § 817.568(10) 33

Fla. Stat. § 843.167(3)(e) 33

Fla. Stat. § 874.04(2)(c) 33

Fla. Stat. § 874.10 33

Fla. Stat. § 876.38 33

Fla. Stat. § 893.135 33

Fla. Stat. § 914.22 33

Fla. Stat. § 921.002 (2008) 56

Fla. Stat. § 921.002(f) (2008) 56

Fla. Stat. § 921.002(g) (2008) 56

Fla. Stat. § 985.225(1) (2003) 54

Fla. Stat. § 985.226 (2003) 55

Fla. Stat. § 985.226(1) (2003) 54

Fla. Stat. § 985.227(1) (2003) 54

Fla. Stat. § 985.227(2)(a) (2003) 54

Fla. Stat. § 985.227(2)(b) (2003) 54

Fla. Stat. § 985.227(2)(c) (2003) 54

Fla. Stat. § 985.227(2)(d) (2003) 54

Miss. Code § 47-7-3(1)(g) 38

Or. Rev. Stat. § 137.707(1) 37

Or. Rev. Stat. § 137.719(1) 37

Mont. Code § 76-18-222(1) (2007) 37

Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1837 62

MISCELLANEOUS

Robert P. Abelson, *Statistics as Principled Argument* (1995) 35

Curt Anderson, *Police Round Up Youths in Slaying of British Tourist*, AP, Sept. 16, 1993 1

Paolo G. Annino et al., *Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation* (July 14, 2009) 33, 40

Behind the Mask of Florida; Ranked as One of Top Three Most Dangerous Places to Visit, Hamilton Spectator (Canada), Dec. 13, 1994 1

Joel Best, *Stat-Spotting: A Field Guide to Identifying Dubious Data* (2008) 35

Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 Crime & Just. 81 (2000) 2, 52

William Booth, *Florida Wants to be on Cutting Edge of Get-Tough Crime Remedies*, Wash. Post, Feb. 17, 1994 2

Bureau of Research & Data Analysis, Fla. Dep't of Corrections, data received June 10, 2009 ..... 34, 55

Bureau of Research & Data Analysis, Fla. Dep't of Corrections, data received Aug. 14, 2009 36

William H. Burgess, *Florida Sentencing* (2008-09) 4

Stephanie Chen, *Teens Locked Up for Life Without a Second Chance*, http://www.cnn.com/2009/CRIME/04/08/teens.life.sentence/index.html 37

Mike Clary, *Florida Tries to Rescue Sunny Image as Violence Gets Worse*, L.A. Times, Sept. 29, 1993 1

Combating Violence & Delinquency: The National Juvenile Justice Action Plan Report, U.S. Dep't of Just., Off. of Juv. Just. & Delinquency Prevention, March 1996, *available at* http://www.ncjrs.gov/pdffiles/jjplanfr.pdf 2, 52, 53

Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law & Practice*, 42 U.S.F. L. Rev. 983 (2008) 37, 44

Delinquency Cases Waived to Criminal Court, 2005, U.S. Dep't of Just., Off. of Juv. Just. & Delinquency Prevention (June 2009) *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/224539.pdf 52

Dep't of Corrs., *Facilities*, 2007-08 Annual Report, *available at* http://www.dc.state.fl.us/pub/annual/0708/facil.html 4

Dep't of Corrs., *Institutional Programs: A Positive Impact on Inmate Lives*, http://www.dc.state.fl.us/orginfo/programs/ 47

Jerry Fallstrom, *Young Killers Fuel Rise in Violent Crime; Florida's Crime Figures for 1993 Bolster Arguments in Tallahassee for a Get-Tough Approach to Teen Criminals*, Orlando Sentinel, Mar. 17, 1994 2

Fla. Const. art. IV, § 8 62

Fla. Dep't of Juvenile Justice, http://www.djj.state.fl.us/ 51

Fla. Dep't of Juvenile Justice Office of Research & Data, data received Sept. 2, 2009 51

Fla. Offender Search, http://www.dc.state.fl.us/ActiveInmates/-search.asp 34

Florida's Governor Calls Session on Crime, N.Y. Times, Oct. 12, 1993 3

Germans Wary of Visiting Florida, St. Petersburg Times, May 18, 1994 1

Historical Summary of Sentencing & Punishment in Fla., Dep't of Corrs., http://www.dc.state.fl.us/pub/history/ 4

H.R. 2289, 111th Cong. (1st Sess. 2009) 5

Int'l Covenant on Civil & Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 ..... 17, 43

Juvenile Justice: A Century of Change, U.S. Dep't of Just., Off. of Juv. Just. & Delinquency Prevention, Dec. 1999, *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/178995.pdf 2, 52

Juvenile Life Without Parole, http://www.pbs.org/wnet/religionandethics/episodes/january-30-2009/juvenile-life-without-parole/2081/ 37

Linda Kleindienst & Diane Hirth, *House Gets Tough with Juveniles*, Sun Sentinel (Ft. Lauderdale, Fla.), Nov. 4, 1993 2

Adam Liptak, *To More Inmates, Life Term Means Dying Behind Bars*, N.Y. Times, Oct. 5, 2005 ..... 38, 62

Edwin McDowell, *After Tourists' Deaths, Florida Works to Recover*, N.Y. Times, Nov. 26, 1993 1

Jane E. Miller, *The Chicago Guide to Writing About Numbers* (2004) 35-36

Jim Mulvaney, *From Youngster to Gangster: How Florida Boy Shot a Tourist*, L.A. Times, Jan. 16, 1994 1-2

National Gang Threat Assessment, Nat'l Gang Intelligence Center (Jan. 2009), *available at* http://www.usdoj.gov/ndic/pubs32/-32146/32146p.pdf 1

Nat'l Juvenile Defender Center, *Florida: An Assessment of Access to Counsel & Quality of Representation in Delinquency Proceedings* (Fall 2006) 6

National Youth Gang Center, Center for Intergovernmental Research, Youth Gang FAQ, http://www.iir.com/nygc/faq.htm 1

Ashley Nellis & Ryan S. King, *No Exit, The Expanding Use of Life Sentences in America*, The Sentencing Project (July 2009) 5, 39

Public on Justice System: Fair, but Still Too Soft, Gallup, Feb. 3, 2004, *available at* http://www.gallup.com/poll/10474/Public-Justice-System-Fair-Still-Too-Soft.aspx 2

The Rest of Their Lives: Life Without Parole for Child Offenders in the United States, Human Rights Watch & Amnesty Int'l (2005) 37, 39-40

U.S. Dep't of Justice, Bur. of Justice Statistics, http://www.ojp.usdoj.gov/bjs/glance/offage.htm 5

Violent Crime Rate at a Glance (1989-08), Fla. Dep't Law Enforcement, http://www.fdle.state.fl.us/Content/FSAC/Crime-Trends/Violent-Crime.aspx 5

STATEMENT OF THE CASE

A. History and Background of Florida's Response to Violent Juvenile Crime.

Florida, the fourth most populous state with nearly 19 million residents, faces unique challenges to curbing violent crimes, including those committed by juveniles. By the 1990s, violent juvenile crime rates had reached unprecedented high levels throughout the nation.[1] Florida's problem was particularly dire, compromising the safety of residents, visitors, and international tourists, and threatening the state's bedrock tourism industry.[2]

---

[1] This included increases in so-called "youth gangs," that arose during that time, generally involving three or more members aged 12 to 24 engaged in elevated levels of violent crime. *See* National Youth Gang Center, Center for Intergovernmental Research, Youth Gang FAQ, http://www.iir.com/nygc/faq.htm (last visited Sept. 11, 2009); *see also National Gang Threat Assessment*, Nat'l Gang Intelligence Center 40 (Jan. 2009) ("typical gang-related crimes" include armed robbery, assault, home invasions, and weapons trafficking), *available at* http://www.usdoj.gov/ndic/pubs32/-32146/32146p.pdf (last visited Sept. 11, 2009).

[2] *See, e.g.*, Curt Anderson, *Police Round Up Youths in Slaying of British Tourist*, AP, Sept. 16, 1993; *Behind the Mask of Florida; Ranked as One of Top Three Most Dangerous Places to Visit*, Hamilton Spectator (Canada), Dec. 13, 1994, at A3; Mike Clary, *Florida Tries to Rescue Sunny Image as Violence Gets Worse*, L.A. Times, Sept. 29, 1993, at A1; *Germans Wary of Visiting Florida*, St. Petersburg Times, May 18, 1994, at 1E; Edwin McDowell, *After Tourists' Deaths, Florida Works to Recover*, N.Y. Times, Nov. 26, 1993, at D11; Jim Mulvaney, *From* (Continued...)

During these years, many Americans considered the criminal system too easy on violent juvenile offenders and demanded reform.[3]

Florida, like over forty other states,[4] purposefully[5] confronted its juvenile violent crime

---

Youngster to Gangster: How Florida Boy Shot a Tourist, L.A. Times, Jan. 16, 1994, at A1.

[3] *See Juvenile Justice: A Century of Change*, U.S. Dep't of Just., Off. of Juv. Just. & Delinquency Prevention 5 (Dec. 1999), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/178995.pdf (last visited Sept. 3, 2009) (Juvenile Justice History); *Combating Violence & Delinquency: The National Juvenile Justice Action Plan Report*, U.S. Dep't of Just., Off. of Juv. Just. & Delinquency Prevention 19 (March 1996), *available at* http://www.ncjrs.gov/pdffiles/jjplanfr.pdf (last visited Sept. 3, 2009) (DOJ Action Plan); *Public on Justice System: Fair, but Still Too Soft*, Gallup, Feb. 3, 2004, *available at* http://www.gallup.com/poll/10474/Public-Justice-System-Fair-Still-Too-Soft.aspx (last visited Sept. 3, 2009) (83% of Americans in 1992 believed the system too lenient on crime).

[4] *See* Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 Crime & Just. 81, 84 (2000); DOJ Action Plan, *supra* note 3, at 22.

[5] *See* William Booth, *Florida Wants to be on Cutting Edge of Get-Tough Crime Remedies*, Wash. Post, Feb. 17, 1994, at A3; Jerry Fallstrom, *Young Killers Fuel Rise in Violent Crime; Florida's Crime Figures for 1993 Bolster Arguments in Tallahassee for a Get-Tough Approach to Teen Criminals*, Orlando Sentinel, Mar. 17, 1994, at A1; Linda Kleindienst & Diane Hirth, *House Gets Tough with Juveniles*, Sun Sentinel (Ft. Lauderdale, Fla.), Nov. 4, 1993, at 1A (reporting a 119-0 vote on a special session bill that required juveniles to be tried as adults in some cases).

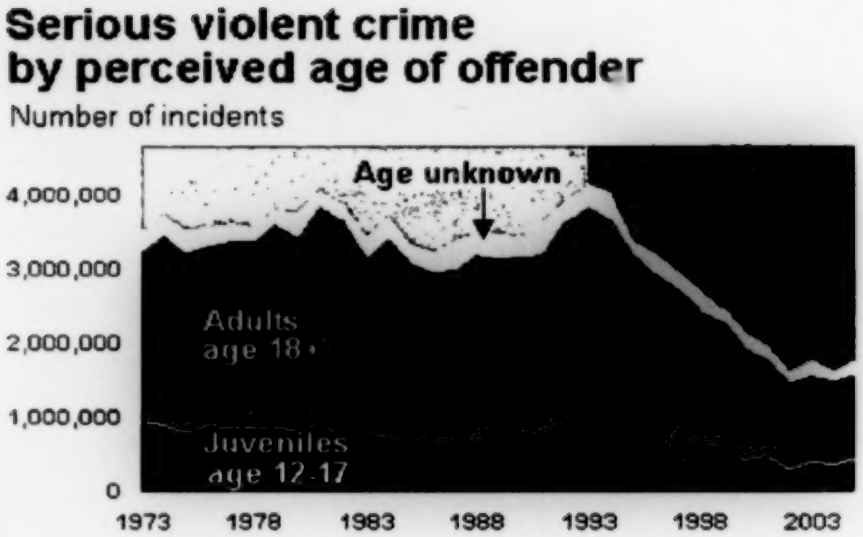
problem. Indeed, it took unprecedented steps. The Florida legislature, which typically meets annually in a single 60-day session, was convened in *two* special sessions in 1993 to address rising crime problems, one specifically addressing juvenile crime.[6] *See* 1993 Fla. Laws, Ch. 93-403 (appropriating additional funds for correctional facilities and juvenile justice reform); 1993 Fla. Laws, Ch. 93-416 (creating legislation to prevent juveniles from accessing firearms). Florida's governor, who convened the legislature, did so because it "is widely recognized that juvenile crime has become the greatest single crime problem in America today." *See* 1994 Fla. Laws xviii (statement of Governor Lawton Chiles). The legislature comprehensively reviewed juvenile crime issues in its regular session in 1994, producing the Juvenile Justice Act, which facilitated the transfer of juvenile offenders to adult criminal courts and gave judges discretion to impose either juvenile or adult sanctions in some cases. *See* 1994 Fla. Laws, Ch. 94-209 (noting juvenile crime problem "has ramifications far beyond the juvenile justice system and affects the health and integrity of the state's business, community, education, and family institutions."). The Act's primary goal was to protect society by emphasizing "control, discipline, punishment, and treatment" of juvenile offenders. Fla. Stat. § 39.002(1)(c) (1995). The Act broadened the ability to prosecute older juvenile offenders, and those who commit serious violent crimes, as adults. Fla. Stat. § 39.0587(1)(e) (1995).

---

[6] *See Florida's Governor Calls Session on Crime*, N.Y. Times, Oct. 12, 1993, at A18.

Florida's criminal sentencing laws and punishment policies from 1980 to 2000 reflected an ongoing, focused effort to deter serious crimes. Many changes in sentencing practices, gaintime policies, and early prison release occurred during this time. *See* William H. Burgess, *Florida Sentencing* 235-423 (2008-09). Additionally, the legislature funded a massive and accelerated prison construction program, resulting in more correctional institutions opening in the 1990s than in any other decade before or since. *See* Dep't of Corrs., *Facilities*, 2007-08 Annual Report, *available at* http://www.dc.state.fl.us/pub/annual/0708/facil.html (last visited Sept. 11, 2009). Indeterminate sentencing with parole was replaced with a determinate, "truth-in-sentencing" policy that required all offenders to serve at least 85% of their sentences. Historical Summary of Sentencing & Punishment in Fla., Dep't of Corrs., http://www.dc.state.fl.us/pub/history/ (last visited Sept. 2, 2009). Violent career criminal laws were enacted along with other statutes substantially increasing mandatory punishments and enhancing sentences for repeat offenders and prison release reoffenders. *Id.* Sentences were also enhanced for those who possess or use firearms during violent or drug trafficking crimes under a 10-20-Life program. *Id.*

These deliberative and focused strategies worked; violent crime rates plummeted from their 1990s highs, both nationwide and in Florida:



As the chart shows, serious violent offenses committed by juveniles aged 12-17 declined 61% from 1993 to 2005 nationwide.[7] In Florida, violent crime rates per 100,000 persons decreased from 1200.3 in 1992 to 670.3 in 2008.[8] Juvenile crime has also

---

[7] U.S. Dep't of Justice, Bur. of Justice Statistics, http:// www.ojp.usdoj.gov/bjs/glance/offage.htm (last visited Sept. 3, 2009).

[8] *See Violent Crime Rate at a Glance (1989-08)*, Fla. Dep't Law Enforcement, http://www.fdle.state.fl.us/Content/FSAC/Crime-Trends/Violent-Crime.aspx (last visited Sept. 3, 2009). Florida and other states continue to consider juvenile sentencing policy, including the potential for parole, a major issue. Ashley Nellis & Ryan S. King, *No Exit, The Expanding Use of Life Sentences in America*, The Sentencing Project 41 (July 2009); *see also* H.R. 2289, 111th Cong. (1st Sess. 2009) (federal bill to give meaningful parole to juvenile offenders).

dramatically decreased; the rate of juvenile crime in Florida fell 30% from 1994 to 2004.[9]

B. Graham's First Violent Offenses: Armed Burglary with Assault or Battery and Attempted Armed Robbery.

In 2003, Terrance Graham, then about six months short of his seventeenth birthday, plotted to rob a Jacksonville barbeque restaurant. [JA 15] After scoping out the restaurant, he and an accomplice donned masks and entered the restaurant at closing time through a rear door that a third accomplice (who worked at the restaurant) left unlocked. [JA 14-15, 438] The restaurant's manager was bludgeoned over the head with a steel bar as the intruders sought money. [JA 6-7, 14-16, 35, 205, 437-38] The victim, in his letter to the sentencing judge, noted that the blows barely missed causing permanent injury or death. [JA 205]

Investigators arrested Graham (and his accomplices), at which time Graham's father told the investigators about burglary tools and a mask that he had found and that he thought Graham might be committing crimes. [JA 437-39]

Graham was charged as an adult with (I) armed burglary with an assault or battery in violation of Florida Statutes sections 810.02(2)(a)

---

[9] Nat'l Juvenile Defender Center, *Florida: An Assessment of Access to Counsel & Quality of Representation in Delinquency Proceedings* 13 (Fall 2006).

and 810.02(2)(b), a first-degree felony punishable by up to life in prison; and (II) attempted armed robbery in violation of Florida Statutes sections 812.13(2)(b) and 777.04(1), a second-degree felony punishable by up to fifteen years in prison. [JA 6-7, 9, 407] Graham pled guilty to both offenses and stipulated to the factual basis for the plea. [JA 17-27] The original trial judge, Judge Peter Dearing, withheld adjudication and gave Graham three years probation with the condition that he serve 12 months in a county detention facility (with 101 days credit) and 100 hours of community service. [JA 17-27, 42-48] During the plea colloquy, the trial judge informed Graham, and Graham acknowledged, that he was agreeing to adult sentencing and giving up his right to have the court consider the imposition of juvenile sanctions. [JA 22-23] Accordingly, the court certified Graham as an adult for future violations of Florida law. [JA 28]

C. Graham's "Second Chance" on Probation: Escalating Violent Criminal Conduct a Month Shy of His Eighteenth Birthday.

Shortly after his release from county jail in June 2004, Graham almost immediately resumed an even more violent criminal life. A month shy of his eighteenth birthday, Graham led older accomplices in planning and then committing an armed robbery at the home of Carlos Rodriguez Lopez, a recent war refugee from Colombia who worked as a construction laborer and lived with his wife and stepson. [JA 53-55, 57-58, 111-16, 314-15, 407]

On December 2, 2004, at about 7:00 p.m., Rodriguez answered a knock at the front door and was confronted by three armed males – Graham, Kirkland Lawrence, and Meigo Bailey. [JA 113, 317] Graham pushed through the door, shoved a pistol in Rodriguez's stomach, and gave orders to the others. [JA 113-14, 318, 321-27] The men forced Rodriguez to the floor; Graham held a gun to Rodriguez's head and yelled at him for money. [JA 114, 319, 350] The group stayed in the home for about a half hour and "destroyed everything." [JA 115, 317] Rodriguez feared for his life, certain that Graham would shoot him. [JA 115, 320] Rodriguez's friend, who was also at the home, was brought out from the bathroom and put on the floor. [JA 114] The intruders stole the friend's gold crucifix and chain (which police later recovered from Lawrence's pockets). [JA 115, 182-83] Ultimately, Graham and the men put the two victims in the closet, stacked furniture against the door, and left. [JA 115, 319]

After leaving Rodriguez's home, accomplice Bailey was shot during an alleged second robbery incident. [JA 160] Graham drove the group in his father's car to the hospital, where he dropped off Bailey and Lawrence, and then sped away. [JA 177, 247, 264, 267, 272, 365-66]

Graham exited the hospital parking lot with no regard for traffic and almost crashed into two other cars, one of which was driven by a sheriff's detective. [JA 247] The detective activated his emergency equipment and pursued Graham, attempting to pull him over. Graham fled, leading the detective on an extended high-speed car chase.

After ignoring stop signs and speeding upwards of 90 miles per hour through residential streets, Graham lost control of the car and crashed into a telephone pole. [JA 247-50] Graham exited the car and fled on foot, but eventually was apprehended. *Id.* Crime scene detectives found three guns inside the car: a .38 revolver and two semiautomatics, a .380 and a .45. [JA 171-73]

Detectives from the Hispanic robberies task force, created in response to a series of home invasion robberies against Hispanic victims in the Jacksonville area, were brought in to investigate Graham. [JA 145, 158, 312] On the night of the robbery, Detective Cesar Parrales met with the victim, Rodriguez, who immediately identified Graham, Lawrence, and Bailey as the perpetrators. [JA 117-24, 148-50] Later, Detective Parrales questioned accomplice Bailey who admitted his involvement in the robbery with Graham and Lawrence. [JA 152]

Detective Brian Kee, also a member of the Hispanic robberies task force, interviewed Graham. [JA 158] After being read his rights, Graham told Detective Kee his version of the night's events. He claimed that while driving his father's car he happened upon Bailey, who had been shot, and Lawrence, and gave them a ride to the hospital. [JA 159-60] Graham contended that he had led police on a high-speed chase after dropping Bailey off because he did not want to violate his 10 p.m. probation curfew. [JA 160] After detectives told Graham that Rodriguez (the victim) had identified him as a perpetrator, they asked Graham, "Aside from the two

robberies tonight how many more were you involved in?" *Id.* Graham answered, "Two or three before tonight." *Id.* The officers arrested Graham on new felony charges of home-invasion robbery and fleeing and eluding.

D. Graham's Violation of Probation and Sentencing Hearings.

In late 2005, the trial judge, Judge Lance Day, began a series of violation of probation (VOP) and sentencing hearings that extended over a six-month period. [JA 67-397] The State filed an affidavit charging Graham with violating conditions of his probation; three violations arose from the Rodriguez robbery and related events:

- Possessing, carrying, or owning any weapon or firearm (Condition (3));
- Committing the offenses of Home Invasion Robbery, Fleeing/Attempting to Elude a Law Enforcement Officer, Aggravated Chase (Condition (4)); and
- Associating with persons engaged in criminal activity (Condition (5)).

[JA 53-55] Graham admitted that he had fled and eluded police, but nothing more. [JA 78, 80-88] In doing so, he repeatedly acknowledged to the trial judge that he understood and accepted that his admission exposed him to a minimum sentence of 66.75 months of incarceration up to a life sentence, which could be based on any additional evidence the

State was prepared to present to the trial judge about the home invasion charge. [JA 78-83; 99-102][10]

The State then presented the testimony of Graham's probation officer [JA 92-108]; Mr. Rodriguez, the victim of the home invasion robbery who identified Graham and the gun Graham used [JA 110-144]; task force officer Detective Parrales, who had interviewed witnesses identifying Graham; task force officer Detective Kee, who interviewed Graham about the home invasion robbery and testified that Graham said he'd been involved with "two or three [robberies] before tonight" [JA 144-164]; the crime scene detective who identified the three handguns in Graham's car [JA 164-175]; and the officer who found the gold necklace and cash on accomplice Lawrence. [JA 176-181] Based on the State's presentation of evidence and Graham's partial admission, the trial court concluded that all three conditions of probation had been violated due to the home invasion robbery. [JA 198-200]

Next, sentencing proceedings were held in a series of three evidentiary hearings over a three-month period when Graham was nineteen. [JA 212-234, 236-282, 307-397] In mitigation, Graham testified, as did a number of his family members. [JA 212-13] Graham asked for leniency because of the family difficulties his incarceration caused. [JA 263,

---

[10] The trial judge corrected the record to reflect that Graham faced exposure of 66.75 months to life on the primary count, armed burglary with assault or battery, and of 66.75 months to fifteen years on the secondary count, attempted armed robbery. [JA 99-102]

275, 374] He claimed that he had "manned up" to his violation because he admitted to fleeing and eluding the police for fear of missing his curfew. [JA 263-64] Graham continued to deny any involvement with the Rodriguez home invasion, knowledge of the firearms recovered from his car, or his admission to police of his involvement in other home invasion robberies. [JA 276] After Graham's initial testimony, the court reserved judgment on sentencing for two months so it could hear more testimony. [JA 281]

When sentencing resumed in May 2006, the court heard again from the victim Rodriguez and Graham, and from Graham's accomplice Lawrence for the first time. [JA 308] Rodriguez re-identified Graham as the leader who had pointed a gun at Rodriguez's stomach and head and demanded money. [JA 314-20] Accomplice Lawrence testified to Graham's role in the Rodriguez robbery and as the driver that night, and identified pictures of the three guns retrieved from Graham's car and used by the group to rob Rodriguez's home. [JA 348, 357-58, 365] He further identified the particular gun that Graham used that night. *Id.*

Graham, however, continued to maintain that he had no involvement in the robbery. [JA 377, 381-86] Graham testified, for instance, that Rodriguez mistakenly identified him, that Lawrence wrongly inculpated him, that his flight from police at the hospital only arose from his concern for making curfew, that police wrongly recounted his admission of participation in a robbery, and that he had no idea from where the guns recovered from his car had come. *Id.*

Ultimately, the trial court concluded:

THE COURT: Mr. Graham, as I look back on your case, yours is really candidly a sad situation. You had, as far as I can tell, you have quite a family structure. You had a lot of people who wanted to try and help you get your life turned around including the court system, and you had a judge who took the step to try and give you direction through his probation order to give you a chance to get back onto track. And at the time you seemed through your letters that that is exactly what you wanted to do. And I don't know why it is that you threw your life away. I don't know why.

But you did, and that is what is so sad about this today is that you have actually been given a chance to get through this, the original charge [*sic*], which were very serious charges to begin with. The burglary with assault charge is an extremely serious charge. The attempted robbery with a weapon was a very serious charge. ... And you get an opportunity and you throw it away. How old are you now?

THE DEFENDANT: Nineteen.

THE COURT: And how old were you when this started?

THE DEFENDANT: Seventeen.

THE COURT: And in less than two years – actually, a lot less than that, in a very short period of time you were back before the Court on a violation of probation,

and then here you are two years later standing before me, literally the – facing a life sentence as to – up to life as to count 1 and up to 15 years as to count 2.

And I don't understand why you would be given such a great opportunity to do something with your life and why you would throw it away. The only thing that I can rationalize is that you decided that this is how you were going to lead your life and that there is nothing that we can do for you. And as the state pointed out, that this is an escalating pattern of criminal conduct on your part and that we can't help you any further. We can't do anything to deter you. This is the way you are going to lead your life, and I don't know why you are going to. You've made that decision. I have no idea. But, evidently, that is what you decided to do.

So then it becomes a focus, if I can't do anything to help you, if I can't do anything to get you back on the right path, then I have to start focusing on the community and trying to protect the community from your actions. And unfortunately, that is where we are today is I don't see where I can do anything to help you any further. You've evidently decided this is the direction you're going to take in life, and it's unfortunate that you made that choice.

I have reviewed the statute. I don't see where any further juvenile sanctions would be appropriate. I don't see where any youthful offender sanctions would be

> appropriate. Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try to protect the community from your actions.

[JA 393-94]

The trial judge adjudicated Graham guilty as to count I, armed burglary with an assault or battery, and sentenced him to life in prison with credit for 12 months and 496 days already served. [JA 395-96] As to count II, the trial court adjudicated Graham guilty of attempted armed robbery and sentenced Graham to 15 years in prison with 12 months and 496 days credit for time served, to run concurrently with count I. *Id.* The trial court also revoked and terminated Graham's probation. *Id.*

E. Graham's State Appeal.

Graham appealed his sentence in June 2006. Florida's First District Court of Appeal upheld the trial court in an April 10, 2008, opinion that extensively analyzed Graham's claim that his sentence violates the prohibitions on cruel and unusual punishment. [Pet. App. 1-22] The district court determined that Graham's life sentence is not facially invalid under this Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005), because, as this Court has recognized, "death is different" and sentencing a juvenile to life imprisonment is not always cruel and unusual. [Pet. App. 6-12] Graham's *per se* claim based on international norms was

rejected in accordance with this Court's decision in *Roper* that reliance on international norms is "not controlling" and that, "[w]hile the weight given the international community is persuasive," the sentencing regimes of state legislatures will generally be upheld if they are otherwise constitutional. [Pet. App. 12-15]

The First District also rejected Graham's *as applied* challenge that his life sentence was grossly disproportionate to his offense, recognizing that the "record facts ... establish that, after being placed on probation – an extremely lenient sentence for the commission of a life felony – appellant committed at least two armed robberies and confessed to the commission of an additional three." [Pet. App. 15-19] Graham's age was considered: "These offenses were not committed by a pre-teen, but a seventeen-year-old ...." [Pet. App. 17] The seriousness of the offense was also noted: "Additionally, these robberies involved the use of a weapon, and appellant himself held a gun to a man's head during the incident for which [his probation] was violated." *Id.* The First District also highlighted that Graham, who wrote a letter expressing his remorse and promising to refrain from criminal activity when he "was given an unheard of probationary sentence for a life felony, ... rejected his second chance and chose to continue committing crimes at an escalating pace." [Pet. App. 18] Accordingly, "the tested theory of rehabilitation" and Graham's "inability to rehabilitate" justified the life sentence Graham received. [Pet. App. 18-19]

Finally, the First District rejected Graham's claim that his sentence violated the International

Covenant on Civil and Political Rights (ICCPR), concluding that, even if Graham had standing to raise such a claim, the treaty is not self-executing and no judicially enforceable right directly arises out of the ICCPR. [Pet. App. 19-22] Accordingly, the First District affirmed Graham's conviction and sentence. [Pet. App. 22]

Graham sought review in the Florida Supreme Court, which declined jurisdiction on August 22, 2008. [Pet. App. 107]

SUMMARY OF THE ARGUMENT

The Eighth Amendment contains no textual or jurisprudential basis for a categorical ban on life sentences without parole for juveniles who commit violent crimes simply because of the fortuity that their victims did not die. Particularly heinous acts that stop short of causing death or a series of escalating violent acts justify long-term sentences for juveniles, including life without parole.

Indeed, this Court's Eighth Amendment non-capital cases establish that a life without parole sentence is not grossly disproportionate to violent crimes against vulnerable victims, such as the armed burglary with assault or battery that Graham committed. Because a life without parole sentence is constitutional for the mere possession of 672 grams of cocaine (*Harmelin*), and a life sentence is constitutional for the commission of three non-violent theft-related offenses (*Rummel*), it is constitutional for Graham's violent armed burglary. Because his sentence is objectively not grossly disproportionate, it does not violate the Eighth Amendment and the judicial inquiry ends.

Notably, Graham's acts were sufficiently violent that the State of Florida, pursuant to its juvenile transfer laws, deemed him worthy of adult court adjudication and adult sanctions, a decision that Graham has not challenged; indeed, he acknowledged and agreed to disposition in the adult system. A primary purpose of juvenile transfer laws is to apply the processes and sanctions of the adult system to those juveniles, such as Graham, who

engage in adult-like crimes. Given that Graham does not challenge his adjudication as an adult via the transfer system, his attempt to inject age at the sentencing phase is unwarranted and, if allowed, would undermine transfer systems nationwide.

Though unnecessary to consider, Graham's intra- and interjurisdictional analyses lack comparative or explanatory power. Florida data show that Graham's sentence is not an unusual one, even taking his age into account. Half of the 301 juvenile offenders serving life sentences in Florida are doing so for at least one non-homicide offense, a figure nearly double that in the study on which Graham primarily rests his argument. Graham also relies on comparisons with highly selective "average" sentences in Florida, which include far less violent or serious conduct, thereby skewing the results in his favor. These type of comparisons are a misleading "apple to oranges" exercise that provide little basis for meaningful judicial review.

Graham's comparisons to offenders in other states are similarly flawed. Three-fourths of the states permit life sentences without parole for juveniles convicted of non-homicides, reflecting a broad consensus on the question presented. It cannot be said that Florida's treatment of juvenile offenders who commit violent crimes that do not happen to kill their victims exceeds constitutional norms. Moreover, the absence of reliable data and studies in the record below make this a particularly troublesome case upon which to establish a new constitutional rule. The lack of a national trend against the sentence imposed here further reflects

that Graham has not met his burden to demonstrate an Eighth Amendment violation. Given the national consensus that life without parole is a permissible sanction for juveniles, the international data on juvenile life sentences should be accorded no weight.

That *Roper* removed the death penalty from the constitutional calculus for minors does not, ipso facto, make harsh penalties, even life sentences, categorically unconstitutional, particularly for potentially lethal violent offenses. Extending the rationale of *Roper*, developed in the limited context of the death penalty, to the exceptionally broad and virtually unlimited context of prison incarceration is compelled neither by legal logic nor by societal norms.

That juveniles as a class generally are less developed mentally than adults is neither a novel idea nor a dispositive factor in this analysis. Our society has accounted for juvenile status in virtually every aspect of our laws and traditions. Indeed, an entire field of study is devoted to juvenile justice and delinquency, and all states, including Florida, devote massive resources and extensive programs to juveniles who are at risk for criminal behavior or have committed crimes. State legislatures, judges, juries, and attorneys take an offender's age into account in many ways.

Thus, the argument that imposition of a lengthy sentence should be categorically prohibited because it fails to take into account a juvenile's lesser culpability ignores these many obvious ways in which youth plays a role in our criminal justice

system and sentencing laws. Florida's legislature, as well as that of every other state, has closely and repeatedly reviewed juvenile justice and sentencing matters over the past twenty years, when crime rates soared and societal concerns justifiably mounted. Principles of sovereignty that accord states broad deference in structuring their criminal and juvenile justice systems must be given great weight. States must have ongoing flexibility to decide what mix of incapacitation, deterrence, and rehabilitation their criminal justice systems will pursue.

Finally, a constitutional rule that categorically excludes life sentences without parole for violent and potentially lethal offenses is unworkable and raises far more "line-drawing" questions than it answers. Does a "non-homicide" offense include violent crimes with dangerous weapons that cause serious injury but not death? Does "life" mean only those sentences that actually impose "life" for a single offense, or does it include consecutive sentences for two or more offenses that effectively amount to (or exceed) the actuarial life expectancy of the offender? Do states have to reinstitute costly and oftentimes problematic parole systems to assist life-sentenced juveniles in reforming themselves? How effective must parole be? The possibilities are boundless, and none of them have been addressed by Graham or his amici.

For all the reasons above, the decision of the Florida appellate court was correct and should be affirmed.

ARGUMENT

Outside the context of the death penalty, this Court has never adopted categorical bans on punishment and it has never considered the characteristics of the offender, such as age, in its Eighth Amendment analysis. Yet Graham seeks to override both of these established and important firewalls protecting the states' power to structure and implement their criminal justice systems as they deem warranted. These systems already account for age, along with offense severity, in the processes by which a juvenile offender is adjudicated and punished for criminal conduct. The linchpin of Graham's argument is the wholesale extension of *Roper* and its categorical ban, which was developed in the unique and highly limited context of the death penalty, to the exceptionally broad and virtually unlimited context of prison incarceration. This extension, which seeks a categorical ban on life sentences for juveniles in the adult system who commit violent felonies merely because no death occurs, is compelled neither by this Court's Eighth Amendment jurisprudence nor by *Roper*.

Section I demonstrates that life without parole is not grossly disproportionate for the type of violent felonies involving lethal weapons that underlie Graham's sentence, even when accounting for an offender's age. Section II explains why *Roper* should not be extended outside the death penalty context, why doing so would undermine the administration of state criminal justice systems that already account for juvenile status, and why Graham's proposed analysis is unworkable.

I. This Court's Eighth Amendment Jurisprudence Supports a Life Sentence Without Parole for Violent Juvenile Offenses, Even When a Victim of the Offense Does Not Die.

A. Under general Eighth Amendment principles that apply to incarceration cases, Graham's sentence is not grossly disproportionate to his offense.

Over the past thirty years, this Court has decided six cases addressing whether a prison sentence for a term of years contravened the Eighth Amendment's prohibition against cruel and unusual punishment. In these cases, the Court applied a "narrow proportionality" principle, noting that successful challenges based on excessiveness of incarceration will be "exceedingly rare" and only when "extreme" circumstances exist. *See, e.g., Lockyer v. Andrade*, 538 U.S. 63, 73 (2003). This Court's threshold consideration involves simply a comparison of the crime committed and the sentence imposed to determine whether an inference of gross disproportionality exists. *Harmelin v. Michigan*, 501 U.S. 957, 1005 (Kennedy, J., concurring).

These principles are reflected in the fact that this Court upheld five of the six sentences, two of which were *mandatory life sentences* for *non-violent crimes* such as theft or drug possession:

- *mandatory life sentence* (with the possibility of parole) for three theft-related felonies (under a recidivist statute) which, in the aggregate, totaled less than $230, *Rummel v. Estelle*, 445 U.S. 263 (1980);
- *forty-year sentence* for possession and distribution of less than nine ounces of marijuana, *Hutto v. Davis*, 454 U.S. 370 (1982);
- *mandatory life sentence* (without the possibility of parole) for possession of 672 grams of cocaine, *Harmelin*;
- *25-year to life sentence* pursuant to California's mandatory Three Strikes law where the triggering offense was felony grand theft of three golf clubs amounting to approximately $1200, *Ewing v. California*, 538 U.S. 11 (2003); and
- *two consecutive 25-year to life sentences* under California's mandatory Three Strikes law for two counts of petty theft of videocassettes valued at approximately $150, *Lockyer*.

The only instance in which this Court found a sentence unconstitutional was a *mandatory life sentence without parole* for a seventh felony, the first six being non-violent felonies and the last being a $100 bad check charge. *Solem v. Helm*, 463 U.S. 277 (1983).

Given this Court's precedents, Graham's life sentence for committing a violent crime is not grossly disproportionate. If a life sentence without parole is constitutional for the possession of 672 grams of

cocaine or for the commission of three non-violent theft-related offenses, then the same sentence for Graham's violent armed burglary with a potentially lethal battery on the victim is constitutional and not grossly disproportionate.

This conclusion is buttressed by the fact that Graham's sentence was discretionary and imposed after he received a second chance on probation during which time he committed more serious violent crimes involving the use of firearms a month before turning eighteen. His sentence was imposed in an individualized sentencing process after a number of hearings at which the trial judge was able to assess Graham's maturity and demeanor; the judge expressly considered Graham's age when imposing the sentence.

A brief overview of the analyses in these cases demonstrates that Graham's individualized sentence for a violent felony is well within constitutional parameters. First, in *Rummel*, this Court observed that the Eighth Amendment proscribed a term of incarceration "grossly disproportionate to the severity of the crime," 445 U.S. at 271, and recognized the inappropriateness of discerning any guiding principles regarding proportionality from its death penalty jurisprudence. Accordingly, this Court perceived no constitutional infirmity regarding either the recidivist statute or the life sentence imposed for a non-violent theft-related felony, recognizing that questions related to sentencing policy are best reserved for the legislature. *Id.* at 285; *see also Hutto*, 454 U.S. at 374.

In *Solem*, which involved a mandatory sentence of life without parole for a $100 bad check following a series of non-violent felonies, this Court recognized that broad deference should be accorded to both legislatures and trial courts regarding the propriety of mandatory punishments for certain crimes. 443 U.S. at 290. To moor its gross disproportionality analysis to an objective framework, the Court explained that this analysis included consideration of: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 292. These factors dictated *Solem's* holding: the defendant's mandatory sentence of life without parole was "significantly disproportionate to his crime" of a $100 bad check and non-violent felony history, and therefore was proscribed by the Eighth Amendment. *Id.* at 303.

In contrast to *Solem*, this Court in *Harmelin* held that a mandatory sentence of life without the possibility of parole for possession of 672 grams of cocaine did not violate the Eighth Amendment. 501 U.S. 957. The reasoning underlying this conclusion derived from separate plurality opinions. Justice Scalia (joined by Chief Justice Rehnquist) asserted that the three objective factors articulated in *Solem* were inapposite; and, *inter alia*, that the Eighth Amendment only proscribed modes of punishment. *Id.* at 965, 976. Justice Kennedy's concurring opinion (joined by Justices O'Connor and Souter) similarly found that Harmelin's mandatory life sentence did not violate the Cruel and Unusual Punishments

Clause; the opinion noted that: "The Eighth Amendment does not require strict proportionality between crime and sentence." *Id.* at 1001 (Kennedy, J., concurring).

Justice Kennedy also recognized that the three objective factors identified in *Solem* as being germane to this narrow proportionality review should not be applied mechanistically. *Id.* at 1005 (Kennedy, J., concurring). In fact, comparative analysis of sentencing practices within, and outside of, a particular jurisdiction might often prove unnecessary. Instead, reviewing courts only need engage in "intrajurisdictional and interjurisdictional analyses ... in the *rare case* in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Id.* (Kennedy, J., concurring) (emphasis added). Because Harmelin had not made a threshold showing that his sentence was grossly disproportionate to his crime, comparative analysis of his sentence was unnecessary, and his mandatory life prison term was not violative of the Eighth Amendment.

Following *Harmelin*, this Court did not have occasion to consider the constitutionality of a noncapital sentence until *Ewing* and *Lockyer*, both involving California's Three Strikes law, which subjected a defendant with two or more prior serious or violent felonies to a mandatory sentence of 25 years to life upon conviction of a third felony. In *Ewing*, a plurality (Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy) again recognized that the Eighth Amendment encompasses

a "narrow proportionality principle" within the sphere of noncapital cases; the opinion set forth the view that Justice Kennedy's concurring opinion in *Harmelin* was instructive regarding the contours of this narrow proportionality analysis. *Ewing*, 538 U.S. at 20, 23-25. Therefore, because Ewing could not show that his sentence was grossly disproportionate to his crime, this Court upheld his mandatory 25-year to life sentence. *Id.* at 30-31.[11]

In *Lockyer*, the Court conceded that its precedents regarding gross disproportionality had been somewhat imprecise: "we have not established a clear or consistent path for courts to follow." 538 U.S. at 72. Nevertheless, the sentence imposed (50 years to life) was not so extraordinary as to be considered grossly disproportionate to the offense (recidivist petty theft), and Eighth Amendment relief was therefore unwarranted. *Id.* at 77.

This Court's noncapital narrow proportionality jurisprudence demonstrates that for a prison sentence to contravene the Eighth Amendment, aberrant circumstances must exist involving a shockingly lengthy sentence imposed for relatively minor misconduct. *Rummel*, 445 U.S. at 274 n.11 (acknowledging that a life sentence for overtime parking would necessarily touch upon proportionality principles).

---

[11] Justices Scalia and Thomas concurred in the judgment, asserting that the Eighth Amendment does not contain a proportionality principle. *See id.* at 31 (Scalia, J., concurring); *id.* at 32 (Thomas, J., concurring).

Yet Graham committed serious violent offenses, and has no claim that his actions were relatively "passive." *See, e.g., Solem*, 463 U.S. at 296 (observing that the petitioner's criminal history was "passive" in nature and did not involve "violence nor threat of violence to any person."). He portrays his sentence as arising from a single isolated incident, an armed burglary with an assault or battery. That characterization is inaccurate. Graham committed two serious violent offenses to which he pled guilty and agreed to be treated as an adult; he was given a second chance by having adjudication withheld, serving one year in county jail, and being placed on probation. But soon after his release, a few weeks shy of his eighteenth birthday, he engaged in an escalating pattern of violent crimes involving firearms and vulnerable Hispanic victims. The trial judge, who closely questioned and observed Graham during the individualized sentencing hearings, concluded that Graham had no real interest in rehabilitation and posed a serious and ongoing threat of violence to the community. Graham's conduct established not lesser, but far greater culpability.

Because Graham finds little support in the gross disproportionality precedents, he argues that his sentence is grossly disproportionate because it is the harshest sentence now available for juveniles. [Br. 55] He posits that because the death penalty may only be imposed on adults for homicide, so too should life without parole be limited to juveniles who commit homicides; in either case, only the most

serious penalty can be imposed for only the most serious crime.[12] Neither the Eighth Amendment nor proportionality principles compel this result. States are free to penalize serious violent and even non-violent acts that do not result in death with sentences identical to those imposed for homicides. *See Harmelin*, 501 U.S. at 1004 (holding that the state could conclude rationally that possession of a large amount of cocaine is "as serious and violent as the crime of felony murder without specific intent to kill, 'a *crime for which no sentence of imprisonment would be disproportionate.*'" (citation omitted) (emphasis added)). The threshold question is simply the narrow issue of whether a life sentence for the type of violent felony at issue is grossly disproportionate, which it is not in Graham's case.

Graham's assertion that age should be an additional factor that broadens this Court's narrow

---

[12] Graham contends his sentence would be appreciably shorter under the Federal Sentencing Guidelines. [Br. 55 n.14] As this Court has recognized, different sovereigns will, necessarily, have distinct punitive objectives that may manifest themselves in harsher sentencing outcomes. *Rummel*, 445 U.S. at 282 ("Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State."). Florida's potentially harsher consequences for armed burglary, when compared to national norms allowing life sentences without parole for non-homicides, does not establish a constitutional violation. *See Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring) ("[T]he circumstance that a State has the most severe punishment for a particular crime does not by itself render the punishment grossly disproportionate.").

proportionality review finds no support in precedent.[13] Graham also overlooks that, like all other states, age and juvenile status are woven into Florida's juvenile and criminal justice systems. These systems establish a reasonable approach to determine under what circumstances a juvenile is eligible for transfer to the adult system by considering an offender's age and criminal history as well as the severity of the particular offense.[14] Like most states, only the most serious juvenile offenders, who have demonstrated criminal maturity beyond their years either by committing extremely serious offenses or by repeating their criminal conduct, are eligible for adult sanctions in Florida. As discussed in section II, given the deference this Court has accorded legislatures, this legislative judgment is appropriate. Age has been taken into account repeatedly in this case, in a manner that ensures that Graham's sentence is constitutional.

---

[13] Graham argues that the personal traits of an offender have been used to assess the gross disproportionality of non-capital offenses, citing to those cases involving recidivist offenders. Those cases, however, involved conduct, not personal traits of the offenders; conduct which the states adjudged (and this Court confirmed) could increase the offender's sentence. *Lockyer*, 538 U.S. at 67; *Ewing*, 538 U.S. at 30; *Rummel*, 445 U.S. at 264.

[14] *See infra* pages 54-55 (discussing Florida's juvenile transfer system).

B. Graham's comparative analysis is seriously flawed.

Because Graham has not demonstrated gross disproportionality, the constitutional analysis should be at an end. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring) ("intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."). Graham's intra- and interjurisdictional comparisons need not be addressed, but deserve comment due to their serious flaws.

First, life sentences without parole may be imposed for a variety of crimes in Florida, namely all life felonies and certain first-degree felonies.[15] While

---

[15] *See* Fla. Stat. §§ 499.0051(10) (knowing sale of contraband prescription drugs resulting in death); 775.0823, 782.04, & 782.051(1) (degrees of murder & attempted murder); 775.0823(8), 787.01, & 787.02 (kidnapping and false imprisonment); 775.084(4)(a) (habitual felony offender convicted of life or first-degree felony); 775.085(1) (committing first-degree felony while evidencing prejudice); 775.0861 (committing first degree felony involving physical force or violence on religious property or during victim's participation in religious service); 775.087 (various offenses for possessing or discharging a firearm or destructive device); 775.0875(2) (taking an officer's firearm during first-degree felony); 775.31(1)(e) (facilitating terrorism); 790.16(1) (discharging machine gun in public with intent to do harm); 790.161 (destructive device causing death); 790.166(2) (using or making available weapon of mass destruction); 790.23(4) (if repeat offender, carrying a weapon while committing gang-related crime); 794.011 & 794.023 (various sexual battery); 810.02(2) (Continued...)

Graham is arguably correct that more serious crimes are included in this list [Br. 61] (e.g., sexual battery), he makes no mention of the arguably less serious crimes also included (e.g., tampering with a witness in first degree felony case or investigation). The inclusion of violent offenses such as armed burglary with assault or battery in this breadth of crimes for which a life sentence may be imposed is not arbitrary.

In reliance on a recently released study based on Florida Department of Corrections (DOC) data, Graham erroneously asserts that 77 out of 301 offenders serving life sentences for juvenile crimes in Florida were sentenced for non-homicide crimes. [Br. 59-60] Paolo G. Annino et al., *Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation* 2 (July 14, 2009) [hereinafter Annino Study]. Even if this statistic is accurate, which it is not, it establishes that Graham's sentence is not

---

(burglary with assault or battery, armed burglary, variety of burglaries causing damage to building); 812.13(2)(a) (armed robbery); 812.133(2)(a) (armed carjacking); 812.135(2)(a) (armed home invasion); 817.487 (first-degree felony committed in conjunction with tampering with caller identification system in order to deceive call recipient); 817.568(10) (first-degree felony offense committed while unlawfully using personal identification information while misrepresenting self as law enforcement officer); 843.167(3)(c) (interception of police communication to aid escape from first-degree felony); 874.04(2)(c) (criminal street gang activity); 874.10 (leading a gang); 876.38 (intentional interference with defense or prosecution of war); 893.135 (various offenses for trafficking, importing, or manufacturing illegal drugs); 914.22 (tampering with a witness in a first-degree felony case/investigation).

unusual because 77 is a substantial number, representing 25% of the juveniles serving life sentences in Florida. The Annino Study incorrectly excludes a substantial number of juveniles (approximately 73) who are serving life sentences without parole for non-homicides simply because these juveniles – *in addition to these non-homicide offenses* – are also serving separate sentences for other crimes in which death or intent to kill occurred. [Br. 3 n.1][16] Each was sentenced to life without parole for a non-homicide offense; the fact that they are also serving sentences on other charges does not alter this fact. As such, a more accurate portrayal is that about half, 150 of 301, of the juvenile offenders serving life sentences in Florida for a non-homicide offense.[17] Given this data, juvenile life sentences for non-homicides are hardly a rare event in Florida and cannot be characterized as unusual.

Moreover, by using broadly defined "average" sentence data from DOC's website in comparisons elsewhere in his brief [Br. 56-59], Graham entirely misses the subtleties of Florida's criminal statutes and draws seriously misleading comparisons. The

---

[16] For example, Florida inmate H15865 received a life sentence for the same primary burglary offense as Graham. *See* Fla. Offender Search, http://www.dc.state.fl.us/ActiveInmates/-search.asp. This offender is dropped from the Annino Study, however, because he has a separate life sentence for a second degree murder conviction.

[17] These figures were determined from the same list of inmates DOC provided to the authors of the Annino study upon which Graham relies. Bureau of Research & Data Analysis, Fla. Dep't of Corrections, data received June 10, 2009.

various crime categories against which his comparisons are made are not at all comparable to Graham's situation. For instance, one of the average statistics that Graham relies on is from a DOC report that combined *all* juvenile burglary offenses without regard to degree of severity or statutory limitations on maximum sentences. [Br. 59] This average included offenders, utterly unlike Graham, whose convictions were for second- and third-degree burglaries that carry maximum prison sentences of only fifteen and five years, respectively, thereby skewing the statistic and making Graham's sentence appear much harsher. *See* Fla. Stat. § 775.082(3)(c) & (d). In addition, Graham's use of the "armed burglary" average for all offenders includes armed burglaries where (a) an assault or battery did not occur, and (b) an offender merely had a weapon versus actually using it, thereby including less serious offenses, again skewing this statistic in his favor. In short, Graham's comparisons to these "averages" border on the meaningless.[18]

---

[18] *See generally* Robert P. Abelson, *Statistics as Principled Argument* 2-7 (1995) (noting that statistical comparisons, particularly those involving "isolated, stand alone" statistics, are prone to flaws and faulty comparisons, such that great care and attention must be used in establishing comparison standards for control groups to "substantially reduce the occurrence of misleading statistical interpretations.") (further noting that "casual, one-shot tabulations of statistical observations will almost certainly be difficult to interpret" and that "it is rhetorically weak to make claims based on them, and such claims deserve to be regarded with great skepticism."); *see also* Joel Best, *Stat-Spotting: A Field Guide to Identifying Dubious Data* (2008) (identifying selective comparisons and averages as fertile areas for statistical and data problems); Jane E. Miller, *The Chicago Guide to Writing About Numbers*

(Continued...)

Even parsing the Question Presented to only "armed burglary" as Graham has restated it, shows that 42 juveniles are serving life sentences for burglary offenses. A preliminary view of DOC data from its public offender information shows that since 1998, 506 offenders (adult and juvenile) have been sentenced to life for first-degree burglary offenses. Bureau of Research & Data Analysis, Fla. Dep't of Corrections, data received Aug. 14, 2009. Because other juvenile and adult offenders receive life sentences for non-homicide crimes and burglaries like Graham's in significant numbers, his sentence cannot be considered intrajurisdictionally disproportionate or unusual.

Turning to an interjurisdictional comparison, Florida's approach to juveniles is not out of line nationally. A substantial majority of states permit the imposition of life without parole on a juvenile for non-homicide offenses.[19] By most accounts, more than 80% of states permit the imposition of life

---

58-71, 174-75 (2004) (noting the importance of defining meaningful units of comparison, making accurate and consistent comparisons, and analyzing the distribution of data before relying on and making representations based on averages or other measures of central tendency).

[19] A chart with the various state laws is omitted to avoid unnecessary repetition with the State of Louisiana's chart in its amicus brief and due to general agreement, with some exceptions, to Graham's chart reflecting states that permit life without parole for juveniles convicted of a non-homicide charge. *See infra* n.21.

without parole on a juvenile.[20] Of those, Graham's own data shows that 36 states plus the federal government and District of Columbia permit life sentences for some crime other than one resulting in the death of a victim.[21] With three quarters of states

---

[20] Forty-two is often cited as the number of states permitting juveniles to serve life without parole, and the figure is often credited to the data in the report *The Rest of Their Lives: Life without Parole for Child Offenders in the United States*, Human Rights Watch & Amnesty Int'l 18 (2005). *See, e.g.*, Stephanie Chen, *Teens Locked Up for Life Without a Second Chance*, http://www.cnn.com/2009/CRIME/04/08/teens.life.sentence/index.html (last visited Sept. 8, 2009). Other studies have found this figure to be 43 states. *See* Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law & Practice*, 42 U.S.F. L. Rev. 983, 1031-1044 (2008) [hereinafter *Global Law & Practice*]. Some media reports place the figure at 44 states. *See, e.g., Juvenile Life Without Parole*, http://www.pbs.org/wnet/religionandethics/episodes/january-30-2009/juvenile-life-without-parole/2081/ (last visited Sept. 8, 2009). The details and distinctions of states' criminal codes and sentencing law, as well as personal interpretations of those statutes by the studies' authors, might explain the reason for the variety of figures. For instance, the 43-state figure excludes Montana, because of the amendment to Montana Code section 76-18-222(1) (2007), which sets forth that *mandatory* minimum sentences and restrictions on parole eligibility do not apply when the offender is under 18. *Global Law & Practice*, at 1037. Another study may have instead included Montana because trial judges there still have discretion to impose such sentences. Notwithstanding these discrepancies, the number of states permitting life without parole for juveniles is consistently reported to be at least 40 of the 50 states (as well as the federal government), or more than 80%, a figure that decisively counters any notion that a consensus against the sentence has developed.

[21] Arizona and Oregon should also be included. Ariz. Rev. Stat. § 13-1423(B); Or. Rev. Stat. §§ 137.707(1), 137.719(1). This (Continued...)

permitting the imposition of life sentences on juveniles for non-homicides, Graham cannot show a national trend exists that prohibits his sentence.[22]

One study (by a group opposed to Florida's sentencing provisions) reports that nationally the number of offenders serving life sentences in the last

---

addition brings the total of jurisdictions in which life without parole for non-homicides may be imposed on a juvenile up to 38 states, the federal government, and the District of Columbia. Graham's exclusion of Mississippi is puzzling. [Br. 63 n.18] That state provides that violent non-homicides may be punished by life sentences, Miss. Code § 47-7-3(1)(g), but provides for the possibility of early release when an offender turns 65. Presumably Graham considers potential parole at age 65 sufficient to meet constitutional objections, which raises the workability of a categorical rule based on the availability of various types of parole systems. *See* section II.D *infra*.

[22] A New York Times study reports a national trend in favor of life sentences, including those without parole, as well as a substantial percentage for non-homicides, based on adult and juvenile data combined. *See* Adam Liptak, *To More Inmates, Life Term Means Dying Behind Bars*, N.Y. Times, Oct. 5, 2005, at 1-1. Its survey "found that about 132,000 of the nation's prisoners, or almost 1 in 10, are serving life sentences. The number of lifers has almost doubled in the last decade, far outpacing the overall growth in the prison population. Of those lifers sentenced between 1988 and 2001, about a third are serving time for sentences other than murder, including burglary and drug crimes. Growth has been especially sharp among lifers with the words "without parole" appended to their sentences. In 1993, the Times survey found, about 20 percent of all lifers had no chance of parole. Last year, the number rose to 28 percent.") (finding more than 25,000 offenders serving life sentences for non-homicide crimes like rape, kidnapping, armed robbery, assault, extortion, burglary, and arson).

25 years has more than quadrupled, with large states such as Pennsylvania, California, and Michigan accounting for the most juveniles serving life without parole sentences. *See* Ashley Nellis & Ryan S. King, *No Exit, The Expanding Use of Life Sentences in America*, The Sentencing Project 6, 17 (July 2009). Florida ranks sixth among states in raw numbers and is below the national average (ranked 30th) with respect to juvenile life without parole sentences as a percentage of its entire life-sentenced population. *Id.* at 17-18. It is therefore not unusual for a juvenile in the United States to receive a life sentence, even for a non-homicide crime.[23] According to one study upon which Graham relies, 7.2% of youth offenders nationwide are serving a life without parole sentence for crimes other than some type of homicide, such as kidnapping, property crimes, sex crimes, and other violent crimes. *See The Rest of Their Lives: Life without Parole for Child Offenders*

---

[23] *See, e.g., Calderon v. Schribner*, 2009 WL 89279 (E.D. Cal. Jan. 12, 2009) (upholding life without parole for a 17-year-old convicted of kidnapping for ransom with great bodily injury); *State v. Warren*, 887 N.E.2d 1145 (Ohio 2008) (upholding life without parole for 15-year-old convicted of kidnapping and rape); *State v. Standard*, 569 S.E.2d 325 (S.C. 2002) (upholding life without parole for burglary and larceny committed by 15-year-old); *State v. Green*, 502 S.E.2d 819 (N.C. 1998) (holding life sentence for 13-year-old for burglary and rape not grossly disproportionate to the crime); *see also State v. Ira*, 43 P.3d 359 (N.M. 2002) (aggregate adult sentence of 91 and one-half years for sexual battery offenses committed by a 15 year-old not grossly disproportionate); *Hawkins v. Hargett*, 200 F.3d 1279 (10th Cir. 1999) (sentencing of 13 year-old to 100-year term (consecutive sentences) for non-homicide crimes not grossly disproportionate).

in the United States, Human Rights Watch & Amnesty Int'l 27 (2005).

Graham's attempt to redefine the Question Presented to only armed burglary creates the illusion of an "unusual" sentence by dramatically narrowing the class. All non-homicides are not equal, nor are all burglaries equal. Because the states have no uniform definitions for "armed burglary with an assault or battery" or "armed burglary" (or, for that matter, parole, probation, or life sentence), this alteration of the issue presented raises problems. More importantly, like his erroneous intrajurisdictional comparisons, Graham again downplays the aggravated nature of his offense and how it might be charged in other states, making it erroneously appear less violent and his sentence harsher.

Notably, the lack of peer review or independent verification of the various studies and reports self-generated and relied upon by those opposed to life sentences is a significant flaw in Graham's intrajurisdictional analysis. It is highly likely that the interjurisdictional data suffers from similar problems. *See* Annino Study at 8 n.16 (explaining that national figure of juveniles serving life sentences for non-homicides could be larger because the study excludes offenders also serving homicide sentences). Additionally, the Annino Study concedes that data was not received from six states that are among the 38 that permit life sentences for juveniles convicted of non-homicides. *Id.* at App. II (data unavailable for Delaware, Nevada, Oklahoma, Utah, Virginia, and Wisconsin).

These flaws highlight a final point pertinent to Eighth Amendment analysis. This Court should take great care in relying on reports and statistics submitted in this litigation. None of it has been meaningfully and objectively reviewed or subjected to critique or cross-examination in a judicial proceeding to provide a check on its accuracy and reliability. Unlike death penalty data, which relates to a single identifiable punishment about which an enormous body of literature developed over the decades, the criminal sentencing laws (both adult and juvenile) and their effects involve multivariate analyses of vastly complex and, to a large extent, unquantifiable variables that make meaningful comparisons within or outside a state particularly hazardous, if not impossible in some situations.

Indeed, the self-generated and self-referential nature of the studies upon which Graham relies make them better suited for political advocacy in the state legislatures, who "are better qualified to weigh and evaluate the results" of those studies "in terms of their own local conditions and with a flexibility of approach that is not available to the courts." *Roper*, 543 U.S. at 618 (Scalia, J., dissenting) (citation and internal quotation marks omitted). Self-referential and largely incomplete or misleading reports and analyses of the parties and amici in this case must be viewed with great caution. Given the nascent and untested nature of these studies and reports, it is suggested that the establishment of a constitutional rule should not precede the development of reliable literature; rather, to the extent it is considered at all, the literature's development must precede judicial action.

Incomplete studies and statistics do not suffice to meet Graham's burden to establish that his sentence is unconstitutional. Even if the Court concludes that Graham's sentence raises an inference of gross disproportionality, Graham nonetheless has not met his burden of showing that his sentence is an outlier in Florida or nationwide that justifies the conclusion that it is cruel and unusual punishment.

C. International comparisons are unnecessary.

Finally, consideration of international law is unwarranted because no national consensus exists disfavoring the sentence of life without parole in these circumstances. International support serves only as confirmation for the Court's determination about the evolving standards of decency in our own country. *See Roper*, 543 U.S. at 578 ("The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (noting international opinion supported the states' legislative consensus); *Trop v. Dulles*, 356 U.S. 86, 102 (1958).

In cases where no legislative trend toward abolition existed among the states, the Court has not explored international law trends. *See, e.g., Ewing v. California*, 538 U.S. 11 (2003); *Johnson v. Texas*, 509 U.S. 350 (1993); *Stanford v. Kentucky*, 492 U.S. 361 (1989); *see also Roper*, 543 U.S. at 604 (O'Connor, J.,

dissenting) ("Because I do not believe that a genuine *national* consensus against the juvenile death penalty has yet developed ... I can assign no such *confirmatory* role to the international consensus described by the Court."). Therefore, because Graham has failed to show a national trend disfavoring the sentence he received, international law has no role in this Court's analysis.

Even if this Court looks to international law, no international obligation prohibits sentencing juveniles to life. The International Covenant on Civil and Political Rights (ICCPR) states generally that minors must be provided "measures of protection as are required by [their] status as [minors]." ICCPR, art. 24, Dec. 19, 1966, 999 U.N.T.S. 171. Though the United States has ratified the ICCPR, with reservations, at no point does the document speak specifically to the topic of juvenile life without parole. *See also Graham v. State*, 982 So. 2d 43, 54 (Fla. Dist. Ct. App. 2008) (noting that because the ICCPR is not self-executing, it cannot limit the Florida legislature's power to sentence offenders under this Court's jurisprudence). The United States has not ratified the United Nations Convention on the Rights of the Child and is therefore not bound by its provisions. No other source cited by Graham imposes any maximum sentencing limitation on this nation or Florida.

Finally, any data or aggregate information regarding international practices must be considered carefully. Just as each state's sentencing structure is different, even more variety exists in the criminal justice and sentencing systems around the world.

Notably, the data fails to explain fully the reasons why nations may have chosen to structure their juvenile sentencing laws differently. For all that is known, a multitude of parochial concerns, totally unrelated to issues of cruel and unusual punishment, may account for the actual reasons why other nations do not impose life sentences on juveniles. Lastly, the data showing which nations impose life without parole on juveniles rely, almost exclusively, on those nations' self reports. *See Global Law and Practice*, *supra* n.20, at 997, 999-1000. Such unverified data should not be the basis for a rule binding on this nation's domestic sentencing laws.

II. *Roper* Does Not Alter This Court's Non-Capital Precedents, Particularly Given That Age is Woven into State Criminal Justice Systems, the Deference to State Sovereignty in Sentencing Matters, and the Unworkability of a Categorical Rule.

A. *Roper*'s elimination of the death penalty for juveniles does not also eliminate harsh prison sentences for juveniles.

Contrary to the weight of this Court's jurisprudence, Graham argues that this case is fully resolved by *Roper v. Simmons*, 543 U.S. 551 (2005). But *Roper*'s holding has negligible applicability to Graham given this Court's repeated admonition that its capital jurisprudence is of little help in other

contexts.[24] The inescapable conclusion from this jurisprudence is that death is different, and for good reason. As the ultimate sanction, final and extreme, the death sentence is simply "in a class by itself." *Furman v. Georgia*, 408 U.S. 238, 289 (1972) (Brennan, J., concurring). Indeed, "[n]o other existing punishment is comparable to death in terms of physical and mental suffering." *Id.* at 287.

Throughout his brief, Graham asserts that *Roper*'s analysis should be extended and applied to juvenile sentences, ignoring this Court's limiting principle that death differs in kind from *any* sentence of imprisonment, no matter the length. *Rummel*, 445 U.S. at 272. This limited view of *Roper* is reflected in the decisions of virtually every court

---

[24] *See Rummel v. Estelle*, 445 U.S. 263, 272 (1980) ("Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of punishment meted out to Rummel."); *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) ("We have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further); *see also Ford v. Wainwright*, 477 U.S. 399, 411 (1986) ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heighted standard of reliability. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (internal citations omitted)); *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) ("[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." (internal citation and quotation marks omitted)).

nationwide that has been asked to extend its reasoning.[25] Graham's claim that "no principled reason" exists "to limit consideration of the juvenile status of an offender to only death penalty cases" [Br. 33], has been soundly and uniformly rejected across the country.

Moreover, Graham's characterization of life without parole as nothing more than a delayed or disguised death sentence ignores the obvious distinctions between prison terms and death. While inmates lose many rights, they retain a range of freedoms including their rights to exercise religion, to receive due process and equal protection under the law, and of access to courts. *Furman*, 408 U.S. at 290 (Brennan, J., concurring).[26] They generally are still

---

[25] *See, e.g., United States v. Feemster*, 483 F.3d 583, 587 (8th Cir. 2007) (refusing to extend reasoning of *Roper* to prevent use of juvenile crimes committed as enhancements on current sentence), *vacated on other grounds*, 128 S. Ct. 880 (2008), *aff'd on rehearing en banc*, 572 F.3d 455 (8th Cir. 2009); *Calderon v. Schribner*, 2009 WL 89279 (E.D. Cal. 2009) (finding LWOP sentence permissible for 17-year-old for a violent felony not resulting in death); *State v. Ninham*, 767 N.W.2d 326 (Wisc. Ct. App. 2009) (LWOP for 14 year old does not violate *Roper*); *Cobos v. Dennison*, 825 N.Y.S.2d 332, 332 (N.Y. App. Div. 2006) (refusing to extend *Roper*'s reasoning to parole hearings). Only one court has extended *Roper*'s reasoning and logic to find a sentence of imprisonment unconstitutional. *In re Nunez*, 93 Cal. Rptr. 3d 242, 263 (Cal. Ct. App. 2009).

[26] Justice Brennan explained:

> Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a

(Continued...)

permitted to communicate with others, maintain and create personal relationships, and visit with their family and friends.[27] Recently this Court noted that "[i]n most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense." *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2665 (2008). Perhaps most significantly, when a life sentence is imposed, the possibility of executive commutation always exists; once an inmate is executed, executive

---

> person punished by imprisonment is evident. An individual in prison does not lose "the right to have rights." A prisoner retains, for example, the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a "person" for purposes of due process of law and the equal protection of the laws. A prisoner remains a member of the human family. Moreover, he retains the right of access to the courts. His punishment is not irrevocable. ... An executed person has indeed "lost the right to have rights." As one 19th century proponent of punishing criminals by death declared, "When a man is hung, there is an end of our relations with him. His execution is a way of saying, 'You are not fit for this world, take your chance elsewhere.'"

Furman, 408 U.S. at 290 (Brennan, J., concurring) (citations omitted).

[27] Additionally, a slew of educational and health programs and services are available for Florida inmates. Dep't of Corrs. Institutional Programs: A Positive Impact on Inmate Lives, http://www.dc.state.fl.us/orginfo/programs/ (last visited Sept. 2, 2009).

commutation is no remedy at all. *See Furman*, 408 U.S. at 306 (Stewart, J., concurring) ("The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability.").

For these reasons, the Court limits application of the death sentence, not just by creating procedural requirements for the sentencing process, but by prohibiting it for entire categories of persons and crimes. *Kennedy*; *Roper*; *Atkins v. Virginia*, 536 U.S. 304 (2002). Therefore, the Court insists that death sentences be saved only for "the worst of crimes." *Kennedy*, 128 S. Ct. at 2665. By contrast, life sentences have never been reserved by this Court for only the worst crimes or offenders. *See Harmelin*, 501 U.S. at 995 (life without parole constitutional for cocaine possession offense).

Graham asserts that in the wake of *Roper*, courts should no longer be permitted to make individualized determinations regarding the appropriate length of incarceration in instances where juveniles commit grievous and violent felonies, because their victims do not happen to die. [Br. 48-50] Graham's belief is premised on *Roper's* recognition that experts in the field of psychology often have difficulty discerning "between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[28] But

---

[28] *Roper*, 543 U.S. at 573 (citing Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity,* (Continued...)

this Court in *Roper* explicitly limited its reasoning to death sentences, stating that "[w]hen a juvenile offender commits a heinous crime, *the State can exact forfeiture of some of the most basic liberties*, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity." 543 U.S. at 573-74 (emphasis added). This Court impliedly recognized that an offender's understanding of his humanity may mature in prison, when it affirmed the resentencing of the juvenile offender to life without parole. *Id.* at 560.

Moreover, Graham's focus on *Roper* and the possibility of juvenile rehabilitation ignores his own failed experience. The trial court initially considered Graham's age and promise of reform and spared him the sentence an adult might have received for his violent offense. But Graham squandered his second chance by committing exceptionally violent crimes upon release. As the Florida appellate court noted: "There is record evidence to support [Graham]'s inability to rehabilitate – evidence that is usually not available upon an original sentencing proceeding." *See Graham*, 982 So. 2d at 53. Thus, Graham's sentence reflects the uncontroversial legislative and trial court judgment that juveniles who are violent recidivists deserve more severe criminal sentencing for their crimes.

Furthermore, under Graham's reasoning, it is unclear how states are permitted to deal with serious

---

Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014-16 (2003)).

juvenile offenders. If a court is deemed incapable of making assessments about whether a juvenile deserves a life sentence, it raises questions about whether a juvenile may be sentenced to any lengthy term of incarceration. This interpretation would undermine judicial discretion in sentencing juveniles who are adjudicated as adults (remembering that Graham consented to such treatment on parole), a result that could not be intended by *Roper*, which upheld such a sentence.

B. Age, as a characteristic of the offender, is already woven deeply into the fabric of state criminal justice systems.

As previously noted, Florida does, in fact, make many provisions for the juvenile in its criminal justice system.[29] The flaw in Graham's argument is that he overlooks the fact that Florida's criminal code, indeed that of every state, takes into account

---

[29] Notably, Graham was charged and treated as an adult, a status to which he repeatedly consented on the record. [JA 22, 35] He explicitly does not contest the process by which he has been charged and adjudicated as an adult. [Br. 14] Yet he now claims that the adult sentence he received is unconstitutionally harsh and presumably adjusted downward to an appropriate juvenile sentence. In effect, he seeks a new constitutional doctrine that categorically prohibits states from treating juveniles as adults for sentencing purposes, even those who consented to being treated as an adult. The Eighth Amendment does not require this result. *See State v. Pittman*, 647 S.E.2d 144, 163 (S.C. 2007) (rejecting similar argument because "the argument does not address the Eighth Amendment's concern, which is punishment; not forum of trial.").

the fact that juveniles are less mature in numerous ways. Florida has a well-developed juvenile justice system.[30] Florida's system reserves adult criminal court only for a small percentage of juveniles committing crimes;[31] namely, those who demonstrate that they are ill-suited for progressive juvenile programs because they committed the most serious of criminal offenses, are older teens, or demonstrated that they are unable or unwilling to benefit from the juvenile system by continuing to commit crimes.

At common law, 16- and 17-year-olds were subject to criminal sanctions. Children under seven were considered incapable of possessing criminal intent; beyond that age, they could be arrested, tried, and punished like adult offenders, including capital sentences, subject to a rebuttable presumption that minors 14 and under lacked the capacity to commit a felony. *See In re Gault*, 387 U.S. 1, 14-16 (1967); *see also Stanford v. Kentucky*, 492 U.S. 361, 368 (1989)

---

[30] Florida's Department of Juvenile Justice was created as an independent agency in 1994 with the mission "[t]o increase public safety by reducing juvenile delinquency through effective prevention, intervention and treatment services that strengthen families and turn around the lives of troubled youth." Fla. Dep't of Juvenile Justice, http://www.djj.state.fl.us/ (last visited Sept. 11, 2009). Its operating budget has more than doubled since its inception in 1994. Nat'l Juvenile Defender Center, *Florida: An Assessment of Access to Counsel & Quality of Representation in Delinquency Proceedings* 14 (Fall 2006).

[31] In 2007-08, 144,705 delinquency referrals were made. Fla. Dep't of Juvenile Justice Office of Research & Data, data received Sept. 2, 2009. Of those cases, 3,611 (2.5%) were transferred to adult court, approximately 2100 (1.5%) of which were older juveniles who committed felonies. *Id.*

(citing 4 W. Blackstone, Commentaries 23-24; 1 M. Hale, Pleas of the Crown 24-29 (1800)). A shift occurred in the late 1800s when the "idea of crime and punishment' was abandoned and children were "to be 'treated' and 'rehabilitated,'" resulting in the juvenile court movement.[32] *Gault*, 387 U.S. at 15-16.

In the 1980s and 1990s, the pendulum swung back after juvenile and violent crime rates skyrocketed nationwide. The juvenile system was deemed a failure, and a "greatly enhanced response" was deemed necessary: "[T]he system has been unable to successfully fulfill its role in securing community safety ... [and] has created an immediate need to target certain serious, violent, and chronic juvenile offenders for prosecution in the criminal justice system."[33] States responded by amending laws to increase the number of juveniles transferred to, convicted in, and sentenced as adults in criminal courts.[34] All states now have mechanisms to handle juveniles in criminal court.[35]

---

[32] *See* Juvenile Justice History, *supra* note 3, at 2.

[33] DOJ Action Plan, *supra* note 3, at 6, 19; *see also* Juvenile Justice History, *supra* note 3, at 4.

[34] *See generally* Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 Crime & Just. 81, 84 (2000); *State v. Green*, 502 S.E.2d 819, 829-30 (N.C. 1998) (describing one state's 249% increase in under-aged 15 violent crime rates and its legislature's decision to reduce, the age at which a juvenile could be transferred to adult court to 13).

[35] Delinquency Cases Waived to Criminal Court, 2005, U.S. Dep't of Just., Off. of Juv. Just. & Delinquency Prevention 1 (June 2009), *available at* http://www.ncjrs.gov/pdffiles1/

(Continued...)

The creation of a system imposing harsher sentences on juveniles due to the commission of more serious juvenile crime is entirely consistent with the Court's evolving Eighth Amendment analyses. As explained by the North Carolina Supreme Court:

> "Evolving standards of decency" are not fixed in time and place, nor are they always focused solely on the rights of criminals. At this time, protection of law-abiding citizens from their predators, regardless of the predators' ages, is on the ascendancy in our state and nation. Similarly, it is the general consensus that serious youthful offenders must be dealt with more severely than has recently been the case in the juvenile system. These tides of thought may ebb in the future, but for now, they predominate in the arena of ideas.

---

ojjdp/224539.pdf. Florida's reforms in particular were highlighted in a 1996 federal action plan dealing with juvenile crime:

> Florida has led the way in an unusual blending of traditional features of the juvenile and criminal justice systems through a three-tiered approach that gives prosecutors expanded discretionary power in making jurisdictional decisions as the age of defendants and the severity of offenses increase. In criminal court, the judge has a variety of sentencing options, including sentencing the offender as an adult or as a juvenile.

DOJ Action Plan, *supra* note 3, at 27.

State v. Green, 502 S.E.2d 819, 831 (N.C. 1998) (holding that mandatory life imprisonment for a first-degree sexual offense by a thirteen-year-old is within bounds of society's current and evolving standards of decency).

In structuring its juvenile transfer provisions, the Florida legislature created a system that takes into account matters such as the offender's age, the seriousness of the offense, and the likelihood of future rehabilitation. Florida imposes no minimum age for prosecuting a juvenile in adult court in only the narrowest of circumstances.[36] When less serious offenses are involved, prosecutors are *required* to directly file criminal charges in adult court *only for older offenders*; namely, 16- and 17-year-olds when they are charged with either repeat serious felonies or enumerated offenses committed with a firearm. Fla. Stat. §§ 985.227(2)(a), (b) & (d) (2003).[37] Discretionary direct filing is available in the case of all 16- and 17-year-olds not charged with a misdemeanor (of those charged with misdemeanors, direct filing is available for certain recidivists). Fla. Stat. § 985.227(1) (2003). Contrary to Graham's

---

[36] Those circumstances are when the offender: (1) demands a transfer (and only then after a hearing before the court), Fla. Stat. § 985.226(1) (2003); (2) is indicted by a grand jury (which may only occur if the crime is punishable by life imprisonment or death), § 985.225(1); or (3) has committed an offense involving the substantial bodily harm or death of a non-participant during the course of a motor vehicle theft, § 985.227(2)(c).

[37] And even then the prosecutor may avoid mandatory direct file by showing good cause. *Id.*

assertions [Br. 4], only certain 14- and 15-year-olds charged with enumerated serious felonies are subject to direct filing. *Id.* Juveniles over 14 charged with less serious offenses are transferrable subject to the court's determination, and in the least egregious cases, only after the court holds a hearing. Fla. Stat. § 985.226 (2003). When hearings are required, the court must consider specific criteria, including the seriousness of the offense, the offender's history, the sophistication and maturity of the offender, and the likelihood of the offender's rehabilitation. *Id.*

In light of these categories and considerations, the Florida Supreme Court concluded, in reviewing a challenge to a similar version of the statute, that "far from being arbitrary, the transfer scheme is entirely reasonable." *State v. Cain*, 381 So. 2d 1361, 1364 (Fla. 1980). The court explained: "as the circumstances supporting transfer become less compelling, the procedures required become more formal." *Id.* Changes to juvenile justice approaches markedly impacted sentencing in Florida. Ninety-four percent of Florida's 301 juvenile offenders currently serving life without parole were sentenced for crimes committed in the 1990s or later. Bureau of Research & Data Analysis, Fla. Dep't of Corrections, data received June 10, 2009.

In conjunction with the changes to the juvenile justice system, Florida enacted changes in sentencing throughout Florida's criminal justice system to attempt to stem the tide of violent crime. These changes culminated in the late 1990s, when Florida implemented the Criminal Punishment Code, which increased the level of judicial discretion

involved in sentencing. Fla. Stat. § 921.002 (2008). Under the Code, judges are authorized to impose any sentence above the minimum required by the offender's sentence scoresheet and up to the statutory maximum. Fla. Stat. §§ 921.002(f) & (g) (2008). Florida's trial judges are thus entrusted with wide discretion, permitting them the opportunity to take into account factors about the offender as discrete as age to those of a less quantifiable nature, such as the violence involved in the particular offense, the risk of recidivism, and the offender's remorse. This discretion explains why only certain juveniles are sentenced to maximum life terms.

Contrary to Graham's statements, Florida's criminal justice system therefore does take a juvenile's age into account and balances it against the other facts of the offense. The legislature took age into account in creating a juvenile justice system with several avenues for prosecution, giving judges sentencing discretion. On this point, Graham's argument that this Court would only be condemning a single trial judge's action by holding juvenile life sentences without parole unconstitutional is flatly incorrect. [Br. 50-53] Such a holding would condemn the legislature's balanced system, plus the decisions of the approximately 150 judges who have imposed this sentence in Florida as well as an unknown number nationwide.

C. The structure of state sentencing laws must be flexible and allow states to pursue methods that best address serious crime problems.

Graham's approach, where a state's sentencing laws are subordinated to claims that juveniles as a class are incapable of deterrence, outgrow their criminal activities, and should be rehabilitated rather than punished, presents a slippery path that undermines a state's "sovereign responsibilities to promulgate and enforce its criminal law." *Rummel*, 445 U.S. at 303 (Powell, J., dissenting). Accepting Graham's premise, that life without parole is unconstitutional as applied to juveniles committing serious violent offenses (that fortuitously do not result in a death), would undo the policy choices of state legislatures and unnecessarily hamper the thousands of discretionary sentencing decisions of trial judges nationwide.

This Court has long recognized that "[r]eviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals." *Solem*, 463 U.S. at 290; *see also Rummel*, 445 U.S. at 274 (reasoning that "the length of the sentence actually imposed is purely a matter of legislative prerogative").

This deference extends to a legislature's decisions about the goals of its criminal justice system. This Court has made clear that the

Constitution "does not mandate adoption of any one penological theory." *Ewing*, 538 U.S. at 25 (quoting *Harmelin*, 501 U.S. at 999); *see also id.* at 28 ("It is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons 'advance[s] the goals of [its] criminal justice system in any substantial way.'" (quoting *Solem*, 463 U.S. at 297)). Punishment, deterrence, incapacitation, and avoiding recidivism are legitimate policy choices states routinely make with regard to serious and dangerous felons.[38] *See Rummel*, 445 U.S. at 276-79 (discussing the states' valid interests in dealing with recidivists through harsher criminal penalties, and the differing and complex state schemes to deal with recidivists). The logic of Graham and his amici, if accepted, would lead to constitutionally-preferred rehabilitative systems where punishment, deterrence, and preventing recidivism are constitutionally-disfavored goals on the mistaken premise that juveniles as a whole, including mature 16- and 17-year olds, simply cannot control their actions and cannot be deterred from committing violent crimes. The merit and potential cost of various rehabilitation programs is a

---

[38] Graham mistakenly argues that life sentences without parole serve no legitimate penological purpose. [Br. 43-47] At a minimum, the goal of deterrence is effectively met by life without parole sentences, as this Court has recognized. *Roper*, 543 U.S. at 571. Because Graham is no longer able to commit violent acts on vulnerable victims in civil society, the goals of protecting the public and preventing Graham from further recidivism are met. Finally, the goal of punishment is met via a sentence that is not grossly disproportionate to Graham's violent offense.

policy decision for state legislatures, not a dictate of the Constitution.

This Court has expressed its unwillingness to micro-manage the states' differing sentencing schemes and the discretionary decisions of prosecutors and judges. *See Rummel*, 445 U.S. at 281-82 (pointing out that "[a]bsent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State."); *see also Solem*, 463 U.S. at 309. Just last term, this Court again re-emphasized the "twin considerations – historical practice and respect for state sovereignty" – that counsel against the federal courts' interference in the states' administration of their respective criminal justice systems. *Oregon v. Ice*, 129 S. Ct. 711, 717 (2009). Laws enacted by state legislatures are presumed valid against constitutional attack, as states act as "laboratories for devising solutions to difficult legal problems," and such problems and solutions can differ between individual states. *Id.* at 718-19. The fact that one state has the most severe punishment for certain crimes does not mean it is in violation of the Eighth Amendment. *See Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring); *see also id.* at 990 ("The Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions."). For this reason, a narrow proportionality review of prison sentences defers to

state legislatures except in the most egregious situations. *See, e.g., Solem*, 463 U.S. at 291 n.17.

D. The categorical rule suggested by Graham in the Question Presented is unworkable.

A categorical constitutional rule that precludes life sentences without parole for all non-homicide offenses for all juveniles under a certain age raises far more questions than it answers – and is simply unworkable. The Question Presented raises a number of definitional questions that highlight this point. For example, a "non-homicide" offense could include a wide swath of crimes ranging from petty offenses against property (e.g., vandalism) to violent crimes with dangerous weapons against people (e.g., armed robbery or a brutal rape that leaves a victim maimed and close to death). Categorically excluding the latter violent offenses, simply because the victims did not die, makes little sense. The categorization of felony murder and other similar offenses could be deemed either non-homicides or homicides creating confusion on how they are to be treated. The permutations are endless, weighing heavily against the imposition of the categorical imperative on the terms and definitions Graham seeks in this case.

Under Graham's theory, any term-of-years sentence would also be problematic. If the Eighth Amendment recognizes, as Graham argues, that all juveniles are less culpable and presumed capable of reform, what constitutionally distinguishes a life sentence from a lengthy term of years, or any term of

years? Why, in view of this supposed presumption, is a life sentence unacceptable but not a sentence of 30 or 40 or 50 years? Even assuming some distinction exists, the term "life" is itself problematic. Does "life" mean only those sentences that actually impose an indeterminate term of life for a single offense, or does it also include consecutive sentences for two or more offenses that in effect amount to (or far exceed) the actuarial life expectancy of the offender? *See, e.g.*, *Hawkins v. Hargett*, 200 F.3d 1279, 1284-85 (10th Cir. 1999) (finding 13-year-old's consecutive sentences for burglary, robbery, and forcible sodomy, which resulted in a 100-year term of imprisonment, did not violate the Eighth Amendment), *cert. denied*, 531 U.S. 830 (2000). For example, two consecutive 30-year sentences for a juvenile offender could in effect be a life sentence. As applied to a term of years, Graham's theory invites appellate review of every sentence imposed on a juvenile on grounds that admit of no principled distinctions. To do so creates additional questions that require additional answers, encroaching more and more on the sovereignty of the states to control and manage their own criminal justice systems based on their own differing goals and needs.

Indeed, a categorical rule would essentially hold that some juveniles have an Eighth Amendment right to demonstrate their reform or rehabilitation. This raises the question of at what point in a lengthy sentence must parole be available to be constitutionally meaningful, whether a parole system must actually result in parole for life

sentenced inmates,[39] and whether the availability of executive commutation plays a role.[40] In this regard, Florida long ago dismantled its parole system in light of adverse reports regarding the operation of the parole commission.[41] Congress phased out parole in the federal system with the Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1837. Must the federal government and those states that have abolished parole commissions now recreate them for juvenile offenders despite their legislative judgments? Are they obligated to develop programs that will assist juvenile offenders in the exercise of this right to demonstrate reform, and how much does the Eighth Amendment require them to spend? And does the existence of any sort of "parole" system meet Graham's demand, or are there yet-to-be-identified Eighth Amendment principles that will govern parole board actions?

This Court should decline Graham's invitation to fashion a new constitutional right. The Eighth Amendment requires only that the severity of an offender's sentence not be grossly disproportionate to

---

[39] For instance, California's parole board reportedly recommended approval for 48 of 4,800 of requests for parole by lifers, but the governor vetoed all but one. *See* Liptak, *supra* n.22.

[40] Florida's constitution provides that the Governor with the approval of two cabinet members may grant full or conditional pardons and commute punishment. Fla. Const. art. IV, § 8.

[41] *See, e.g., Roberson v. Fla. Parole & Probation Comm'n*, 444 So. 2d 917, 920 (Fla. 1983).

the gravity of his crimes. Though Graham's punishment is harsh, it is imposed on numerous juvenile and adult offenders in Florida and is not unlike many other sentences permitted in a majority of states. Consequently, his sentence is not disproportionate under the Eighth Amendment.

CONCLUSION

For all of the above reasons, this Court should affirm the First District Court of Appeal, State of Florida.

Respectfully submitted,

BILL MCCOLLUM
Attorney General of Florida
Scott D. Makar
Solicitor General
Counsel of Record
Louis F. Hubener
Chief Deputy Solicitor General
Timothy D. Osterhaus
Craig D. Feiser
Courtney Brewer
Ronald A. Lathan
Deputy Solicitors General
PL-01, The Capitol
Tallahassee, FL 32399-1050
850-414-3300
850-410-2672 fax
Counsel for State of Florida

Dated: September 14, 2009

REPLY BRIEF

(26)

No. 08-7412

Supreme Court, U.S.
FILED
OCT 14 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

TERRANCE JAMAR GRAHAM, PETITIONER,

v.

STATE OF FLORIDA

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

REPLY BRIEF

DREW S. DAYS, III
BRIAN R. MATSUI
SETH M. GALANTER
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, D.C. 20006

GEORGE C. HARRIS
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105

BRYAN S. GOWDY
Counsel of Record
JOHN S. MILLS
REBECCA BOWEN CREED
JESSIE L. HARRELL
MILLS CREED & GOWDY, P.A.
865 May Street
Jacksonville, FL 32204
(904) 350-0075

Attorneys for Petitioner

OCTOBER 14, 2009

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

REPLY BRIEF 1

I. AN OFFENDER'S STATUS AS A JUVENILE UNDER AGE 18 IS RELEVANT TO DETERMINE WHETHER HIS SENTENCE COMPORTS WITH THE EIGHTH AMENDMENT 1

A. *Roper*'s Rationale Cannot Be Cabined Solely To Capital Cases 2

B. Age Should Be Considered When Assessing The Constitutionality Of A Life-Without-Parole Sentence Because It Shares Important Similarities With A Capital Sentence 6

C. A State's Consideration Of Age In The Criminal Justice System Before Sentencing Does Not Satisfy The Eighth Amendment 8

II. PETITIONER'S INTERPRETATION OF THE EIGHTH AMENDMENT IS WORKABLE AND LEAVES SIGNIFICANT DISCRETION FOR THE STATES TO CONTROL JUVENILE CRIME 12

A. Invalidating Petitioner's Sentence Will Not Deprive States Of The Ability To Punish Juvenile Offenders And Deter Criminal Activity 12

TABLE OF CONTENTS – Continued

Page

B. Invalidating Petitioner's Sentence Will Not Require States To Create Any Particular Or Unworkable Sentencing Regime 16

III. THE INTRA-STATE, INTER-STATE AND INTERNATIONAL COMPARISONS DEMONSTRATE THAT GRAHAM'S SENTENCE IS CRUEL AND UNUSUAL 19

A. Petitioner's Life-Without-Parole Sentence For Armed Burglary Is Unusually Harsh Compared To Other Sentences Imposed By Florida 21

B. Although Most States Authorize Life Without Parole For Non-Homicide Juvenile Offenders, The Infrequent Use Of That Sentence Demonstrates That It Is Cruel And Unusual 22

C. International Law And Practice Also Reflect The Cruel And Unusual Nature Of Sentencing Juveniles To Life Without Parole 30

CONCLUSION 32

TABLE OF AUTHORITIES

Page

CASES:

Atkins v. Virginia, 536 U.S. 304 (2002) 8, 12

Brennan v. State, 754 So. 2d 1 (Fla. 1999) 9

Calderon v. Schribner, No. 2:06-cv-00770, 2009 WL 89279 (E.D. Cal. Jan. 12, 2009).....27

Coker v. Georgia, 433 U.S. 584 (1977) 12, 15, 25, 30

District Attorney's Office for Third Judicial District v. Osborne, 129 S. Ct. 2308 (2009).....19

Enmund v. Florida, 458 U.S. 782 (1982) 12, 14, 25, 30

Ewing v. California, 538 U.S. 11 (2003) 5

Ford v. Wainwright, 477 U.S. 399 (1986) 16, 19

Harmelin v. Michigan, 501 U.S. 957 (1991).....10, 14

Hawkins v. Hargett, 200 F.3d 1279 (10th Cir. 1999), *cert. denied*, 531 U.S. 830 (2000).....27

Hope v. Pelzer, 536 U.S. 730 (2002) 13

Jackson v. Florida Parole & Probation Commission, 429 So. 2d 1306 (Fla. Dist. Ct. App. 1983) 18

Kennedy v. Louisiana, 128 S. Ct. 2641 (2008).....12, 14, 15, 16, 23

Lawrence v. Texas, 539 U.S. 558 (2003).....25

Parham v. J.R., 442 U.S. 584 (1979).....16

Roper v. Simmons, 543 U.S. 551 (2005).....*passim*

TABLE OF AUTHORITIES – Continued

Page

Ruth v. State, 949 So. 2d 288 (Fla. Dist. Ct. App. 2007) 11

Solem v. Helm, 463 U.S. 277 (1983) 10, 14

State v. Green, 502 S.E.2d 819 (N.C. 1998), *cert. denied*, 525 U.S. 1111 (1999) 27

State v. Ira, 43 P.3d 359 (N.M. 2002) 27

State v. Pittman, 647 S.E.2d 144 (S.C. 2007), *cert. denied*, 128 S. Ct. 1872 (2008) 9

State v. Smith, 607 S.E.2d 607 (N.C.), *cert. denied*, 546 U.S. 850 (2005) 27

State v. Standard, 569 S.E.2d 325 (S.C. 2002), *cert. denied*, 537 U.S. 1195 (2003) 27

State v. Stinnett, 497 S.E.2d 696 (N.C. App.), *cert. denied*, 525 U.S. 1008 (1998) 27

State v. Warren, 887 N.E.2d 1145 (Ohio 2008) 27

Thompson v. Oklahoma, 487 U.S. 815 (1987) 9, 12, 23

Weems v. United States, 217 U.S. 349 (1910) 13

Wilkerson v. Utah, 99 U.S. 130 (1878) 13

Willingham v. State, 781 So. 2d 512 (Fla. Dist. Ct. App. 2001) 10

Winther v. State, 812 So. 2d 527 (Fla. Dist. Ct. App. 2002) 10

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION, STATUTES & RULES:

U.S. Const. amend. VIII ..... *passim*

Cal. Penal Code

§ 667.7(a)(2) 26

§§ 3044-3053 18

Colo. Rev. Stat. § 18-1.3-401(4)(b) 17

Del. Code tit. 11, §§ 4341-4353 18

Fla. Stat.

§ 775.082(1) 29

§ 947.165 18

§ 947.18 18

§ 985.225(1) (2003) 9

§ 985.233 11

§ 985.56(1) 9

Iowa Code §§ 904A.1-904A.6 18

La. Rev. Stat. §§ 15:574.2-574.13 18

Neb. Rev. Stat. §§ 83-188—83-196 18

N.J. Stat. §§ 2A:4A-26, 2C:43-7.1(a) 22

S.C. Code §§ 24-21-10—24-21-90 18

Fla. R. Executive Clemency §§ 1, 4 18

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

Paolo G. Annino, David W. Rasmussen, & Chelsea Rice, *Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to the Nation* (updated Sept. 14, 2009).....24, 25, 26, 27

Joshua Dressler, *Understanding Criminal Law* (5th ed. 2009).....14

Florida Department of Corrections Institutional Programs: *A Positive Impact on Inmate Lives* 7

Florida Parole Commission, *2007-2008 Annual Report* (2008).....18

Human Rights Watch/Amnesty International, *The Rest of their Lives: Life Without Parole for Child Offenders in the United States* (2005).....8, 15

David S. Lee & Justin McCrary, *The Deterrence Effect of Prison: Dynamic Theory and Evidence* (Aug. 2009).....13

Ashley Nellis & Ryan S. King, The Sentencing Project, *No Exit, The Expanding Use of Life Sentences in America* (July 2009).....24

Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Disclosure*, 41 U.C. Davis L. Rev. 111 (2007).....6

United Nations Convention on Rights of the Child, U.N. Doc. A/44/736, 28 I.L.M. 1456 (Nov. 20, 1989).....30

REPLY BRIEF

It is cruel and unusual to impose a criminal sentence that declares a juvenile forever incapable of reform and forever unfit for return to society when the juvenile has not killed or intended to kill. This conclusion rests on two intersecting principles: (1) juveniles are inherently less culpable and more capable of reform than adults; and (2) offenders who do not kill are less culpable than those who do. And the conclusion is confirmed by the objective consensus before this Court, primarily the scarcity, outside of Florida, of any non-homicide juvenile offenders serving sentences of life without parole.[1] Nothing in the briefs of respondent or its amici undermines this conclusion or the principles and objective indicia that support it.

I. AN OFFENDER'S STATUS AS A JUVENILE UNDER AGE 18 IS RELEVANT TO DETERMINE WHETHER HIS SENTENCE COMPORTS WITH THE EIGHTH AMENDMENT

Respondent admits that an offender's age could be relevant to the Eighth Amendment's proportionality analysis in a non-homicide case. In *Sullivan v. Florida*, respondent acknowledged that "at a certain point an offender's young age could play into the

---

[1] For brevity's sake, we generally refer to petitioner's sentence and others like it as being "life without parole." However, it is more accurate to state that petitioner's sentence is life imprisonment without the opportunity or possibility to seek parole ever.

gross disproportionality analysis for prison sentences in ways it does not for adult offenders." No. 08-7621 Resp. Br. 21. This concession is fatal to respondent's categorical claim in this case that the age of the offender is always irrelevant. Having conceded that age is relevant at least to some offenders less than 13 years old, respondent proffers no rational justification for treating older juvenile offenders as if they were adults and for deviating from the reasoning of *Roper v. Simmons*, 543 U.S. 551 (2005).

A. *Roper*'s Rationale Cannot Be Cabined Solely To Capital Cases

Roper is the latest chapter of this Court's consistent jurisprudence holding that constitutional protections apply differently to juveniles because they, as a class, differ from adults in constitutionally significant ways. *See* Juvenile Law Center *et al.* Amicus Br. 6-9.

This Court established in *Roper* that juveniles who were under age 18 at the time of their criminal offense are not yet fully formed human beings and, consequently, less morally culpable for their actions and more capable of reform than adults. *See* 543 U.S. at 569-570. Thus, although juveniles may be criminally punished for their conduct, the Eighth Amendment protects them from harsh punishments that, in its independent judgment, this Court determines are particularly cruel in light of the uncontested differences between adults and juveniles.

Respondent and the amici States do not contest that modern science establishes a biological basis for the previously well-understood proposition that juveniles are more malleable to peer pressure and environmental factors than adults, and that the overwhelming majority of juveniles literally grow out of their anti-social phase as their brains develop. These uncontested scientific truths are confirmed by the real-life testaments and experiences of former juvenile offenders like Charles Dutton and former Senator Alan Simpson, as well as by educators and correctional supervisors, *see* Former Juvenile Offenders Amicus Br. 7-32; Council of Juvenile Corr. Adm'rs Amicus Br. 16-27; Educators Amicus Br. 14-30.

The undisputed science also confirms this Court's holding in *Roper* that it is impossible to discern *ex ante* which juveniles will become law-abiding citizens and which will continue to be a threat to society for the rest of their lives. Am. Psychological Ass'n. *et al.* 19-22; Aber *et al.* Amicus Br. 28-31. These scientific findings do not suggest, nor do we, that biology causes juveniles to commit crimes. But biology does explain why many juveniles who commit crimes stop doing so once they reach adulthood.[2]

---

[2] Notably, not a single mental health or medical professional or organization joined the two amici briefs in support of respondent that criticize some of the statements made by the multiple respected mental health and medical professionals and organizations in their amicus briefs to this Court. While they

(Continued on following page)

Respondent argues—inconsistently with its concession—that, because "death is different," this Court may consider *only* the nature of the offense, and not the youth of the offender, as part of its Eighth Amendment proportionality analysis for non-capital cases. Resp. Br. 23-31. But the insights of *Roper*, and the differences between youth and adulthood, do not evaporate simply because non-capital rather than capital punishment is at issue.[3] Moreover, none of the six pre-*Roper* cases challenging non-capital sentences upon which respondent relies (Resp. Br. 24) for its "death is different" argument involved a juvenile offender, and none says, much less holds, that age is not an appropriate consideration under the Eighth Amendment.

The nature of the offense is not the *only* factor that has been or must be considered under the Eighth

---

question the legal ramifications of these findings, neither undermines the core of petitioner's Eighth Amendment claim: Juveniles are inherently less culpable and more capable of reform than adults. This proposition is common sense that every parent knows and that merely has been confirmed and explained by science. *See Roper*, 543 U.S. at 569-570.

[3] No party or amici has presented a logical reason to draw in this case a different age line between maturity and immaturity when dealing with another extremely harsh punishment. There has been no change in the state statutes relied upon in *Roper* to establish age 18 as the demarcation between youth and adulthood for Eighth Amendment purposes. Pet. Br. 40 & n.12. The statutes protecting younger teens in other areas, cited by the *Sullivan* petitioner, were in effect at the time of *Roper* and thus should not alter this Court's analysis.

Amendment in determining whether a sentence is grossly disproportionate. To the contrary, this Court's non-capital precedents have made the offender's characteristics relevant by considering the offender's recidivism. Pet. Br. 25, 32.

Respondent argues that the consideration of recidivism involves the offender's prior "conduct," not the offender's "personal traits." Resp. Br. 31 n.13. Putting those unhelpful labels to one side, recidivism is like age in all critical respects. First, both are irrelevant to guilt for the underlying offense. Second, both are material to moral culpability and the capacity to reform in the future: adult recidivism demonstrates a long-term inability or unwillingness to comply with society's rules, *see Ewing v. California*, 538 U.S. 11, 29 (2003) (plurality opinion) (noting that a State was justified in incapacitating a recidivist offender because his recidivism showed that he was "incapable of conforming to society's norms"), while, in contrast, a juvenile offender's age points in the opposite direction by demonstrating decreased moral culpability and a capacity for reform. Finally, both recidivism and age are easy for courts to determine, and do not require intricate, death-penalty-like sentencing proceedings.

B. Age Should Be Considered When Assessing The Constitutionality Of A Life-Without-Parole Sentence Because It Shares Important Similarities With A Capital Sentence

The severity of a sentence of life without parole cannot be seriously questioned, notwithstanding respondent's claims to the contrary. Resp. Br. 46-47. Life without parole, like the death penalty, forever infringes on the offender's human dignity, individuality, freedom, and autonomy. Though the death penalty alone affirmatively extinguishes a life, the death penalty and life without parole both declare the offender perpetually unfit for return to society and forever incapable of reform. Petitioner's sentence is different from, and more severe than, sentences for a term of years – even very long sentences – because it conclusively determines that an offender is irreparable and must die in prison.

Moreover, the endlessness of a life-without-parole sentence compounds the shear hopelessness of a juvenile's life in prison. Before death in prison, the offender's life will be marked by, among other things, the "ever-present risks of being assaulted, raped, or even turned into a gang sex slave; contracting HIV, tuberculosis, or other diseases; being put into isolated confinement, or twenty-three hour a day lockdown; and being thrown into a cell with a severely mentally disturbed and potentially violent inmate." Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Disclosure*,

41 U.C. Davis L. Rev. 111, 123-124 (2007) (internal footnote omitted).

The harshness of a sentence of life without opportunity for parole is not mitigated by the limited "rights" enjoyed by the inmate during the scores of years he is imprisoned without any hope of release (exercise of religion, due process, access of courts, etc.). *Contra* Resp. Br. 46-47. Death-row inmates also enjoy these same rights prior to their execution. Ultimately, however, both the death-row inmate and the life-without-parole inmate face death in a state-controlled institution without any possibility of ever living outside that institution absent clemency. It is this reality of an inevitable death in a state-controlled institution that is harsh, irrespective of the rights that may be exercised during the intervening years between initial incarceration and death.

Nor is petitioner's harsh punishment significantly mitigated by the "slew" of educational programs in Florida's prison system that respondent promotes. Resp. Br. 47 n.27. These programs generally are not available to life-without-parole inmates because their purpose is to assist the inmate to "make a successful transition back into society,"[4] a purpose totally at odds with a life-without-parole sentence.

---

[4] Florida Dep't of Corrs. Institutional Programs: *A Positive Impact on Inmate Lives*, *available at* http://www.dc.state.fl.us/orginfo/programs/index.html (last visited Oct. 12, 2009) (cited at Resp. Br. 47 n.27).

See Human Rights Watch/Amnesty Int'l, *The Rest of their Lives: Life Without Parole for Child Offenders in the United States* 69 (2005) (*available at* http://www.hrw.org/en/reports/2005/10/11/rest-their-lives-0) (last visited Oct. 12, 2009) (noting how most juvenile offenders sentenced to life without parole are denied access to educational and vocational programs).

For these and other reasons, our Nation's major religions, as well as doctors, lawyers and other important segments of civil society, all reject life without the possibility of parole as a morally unacceptable punishment because it denies the real possibility that a juvenile will change and be able to rejoin society. *See, e.g.*, Am. Assoc. of Jewish Lawyers & Jurists *et al.* Amicus Br. 6-8, 14-27; *see also Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing as "further support to our conclusion that there is a consensus" the views of "representatives of widely diverse religious communities in the United States").

C. A State's Consideration Of Age In The Criminal Justice System Before Sentencing Does Not Satisfy The Eighth Amendment

Florida's age-based legislative judgments and classifications for transferring a juvenile to adult court do not remedy the constitutional infirmity of petitioner's life-without-parole sentence because the Eighth Amendment is not concerned with the *forum* in which an offender is prosecuted, but rather with the *punishment* imposed. *Contra* Resp. Br. 50-56; *see*

also State v. Pittman, 647 S.E.2d 144, 163 (S.C. 2007) (cited at Resp. Br. 50 n.29) (noting that the Eighth Amendment's concern is "punishment, not forum of trial"), *cert. denied*, 128 S. Ct. 1872 (2008). Indeed, the States' age-based classifications for prosecuting juveniles in adult court "tells us nothing about the judgment the[ ] States have made regarding the *appropriate punishment* for * * * youthful offenders." *Thompson v. Oklahoma*, 487 U.S. 815, 826 n.24 (1987) (plurality opinion) (emphasis altered).

In any event, Florida's transfer statutes do not serve as a check against cruel and unusual punishments of juveniles, as the Supreme Court of Florida itself has concluded. *See Brennan v. State*, 754 So. 2d 1, 9 (Fla. 1999). This is so because Florida's transfer statutes authorize a juvenile of *any age* to be indicted and prosecuted in adult court and, if convicted, to be sentenced to death or life without parole. *See, e.g.*, Fla. Stat. § 985.225(1) (2003) *re-codified at* Fla. Stat. § 985.56(1) (2009) (mandating that a juvenile of "any age * * * must be tried and handled in every respect as an adult" if the juvenile is indicted for any "violation of state law punishable by death or by life imprisonment"). Even absent an indictment, a Florida prosecutor may, at his or her unreviewable discretion, charge most juveniles in adult court for most crimes, as was true for petitioner in this case. Pet. Br. 3-5. Once he is charged in a Florida adult court, a juvenile offender is subject to a sentence of life without parole if convicted of over 50 different

offenses (even if the juvenile offender has no prior convictions). Pet. Br. 8-9 & n.5.

Florida likewise grants virtually unfettered discretion to its trial judges at sentencing. Neither the juvenile law nor the general criminal law of Florida authorizes any review of a Florida trial judge's discretionary decision of what sentence to impose, so long as it is within the range authorized by statute. *See Winther v. State*, 812 So. 2d 527 (Fla. Dist. Ct. App. 2002); *Willingham v. State*, 781 So. 2d 512 (Fla. Dist. Ct. App. 2001). Indeed, this very case demonstrates the lack of any checks in Florida's sentencing system for protecting juvenile offenders convicted in adult court. Although the prosecutor, the Department of Corrections, and Graham's defense counsel all urged the sentencing judge to impose a sentence less than life without parole, the judge exercised his unreviewable, unchecked power to forever condemn Graham, a juvenile offender, as unfit for living in society. Pet. Br. 20-21.[5]

---

[5] This case is akin to *Solem*, in that ultimately a single individual judge determined Graham's sentence. The sentence thus does not warrant the same respect to which a legislatively-mandated judgment might be entitled. *See Harmelin v. Michigan*, 501 U.S. 957, 1006 (1991) (Kennedy, J. concurring in part and concurring in judgment) (distinguishing *Solem v. Helm*, 463 U.S. 277 (1983)). Respondent wrongly asserts that the life-without-parole sentence at issue in *Solem* was mandatory. Resp. Br. 24, 26. The sentence there was "discretionary rather than mandatory," 463 U.S. at 299 n.26.

Lastly, Graham did not waive the right to challenge his sentence under the Eighth Amendment, even assuming such an agreement by a juvenile is enforceable. *Contra* Resp. Br. 18, 50 n.29. As part of his plea bargain, Graham waived only his statutory rights under Section 985.233 of the Florida Statutes. J.A. 22-26, 33-38. That statute permits, but does not require, a trial judge to go below the adult mandatory minimum sentence and to impose a lesser "juvenile" or "youthful offender" sanction. Pet. Br. 6-8 (citing *Ruth v. State*, 949 So. 2d 288, 290 (Fla. Dist. Ct. App. 2007)). Thus, Graham waived only the opportunity for the judge to sentence him to less than 60 months imprisonment. Pet. Br. 20. He did not waive any opportunity to argue that his youth was relevant under the Eighth Amendment to the length of his sentence. Indeed, in the same plea bargain, Graham expressly waived several constitutional rights (e.g., the right to remain silent, the right to confront witnesses, the right to a trial, etc.). Nowhere, however, is there any mention of a waiver of the Eighth Amendment or one's right to be free from cruel and unusual punishments or to challenge the sentence on appeal. J.A. 21, 31-38.

II. PETITIONER'S INTERPRETATION OF THE EIGHTH AMENDMENT IS WORKABLE AND LEAVES SIGNIFICANT DISCRETION FOR THE STATES TO CONTROL JUVENILE CRIME

Petitioner does not seek to require States to craft from whole cloth a complicated parole system. Petitioner seeks only a narrow ruling from this Court: a life-without-parole sentence violates the Eighth Amendment if imposed for a non-homicide offense committed by an offender under age 18. Such a ruling would preserve many types of sentences for States to impose in furtherance of their legislative policies, and it would not, in any way, guarantee petitioner's eventual release.

A. Invalidating Petitioner's Sentence Will Not Deprive States Of The Ability To Punish Juvenile Offenders And Deter Criminal Activity

This Court may not ignore what, in its independent judgment, it determines is an unconstitutional punishment solely because invalidating that punishment would eliminate a sentencing option for the States. *Contra* Resp. Br. 57-60; States of Louisiana *et al.* Amicus Br. 30. In *Thompson*, *Coker*, *Enmund*, *Atkins*, *Roper*, and *Kennedy*, the Court narrowed the circumstances in which States could impose the death penalty, without regard to the fact that such rulings deprived States of a punishment that their legislatures sought to impose. Nor is this result limited to the death penalty. *See, e.g.*, *Hope v.*

Pelzer, 536 U.S. 730 (2002) (use of the hitching post violates clearly established Eighth Amendment jurisprudence); *Weems v. United States*, 217 U.S. 349 (1910) (holding that a punishment of 12 years jailed in irons, at hard and painful labor, violated the Eighth Amendment); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) ("[I]t is safe to affirm that punishments of torture, * * * and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.").

Invalidating petitioner's sentence will not "mandate adoption of any one penological theory." Resp. Br. 58 (quoting *Ewing*, 538 U.S. at 25 (plurality opinion)). Respondent will remain free to exercise legislative judgment and emphasize retribution and deterrence over rehabilitation in its criminal justice system.[6] Indeed, this Court has previously found no conflict between the invalidation of certain sentences and "the broad authority that legislatures necessarily

---

[6] Respondent points to a temporal decline in the rate of crime both nationally and in Florida during the past 10 to 15 years (Resp. Br. 4-6) but it does not cite a single study showing that this decrease stems from the deterrence of juvenile crime due to long prison sentences (like life without parole). And respondent does not refute the multiple studies demonstrating that longer adult punishments do not deter juvenile offenders. Pet. Br. 46-48 & n.13. A recent study focused on Florida's juvenile crime comports with these earlier studies. *See* David S. Lee & Justin McCrary, *The Deterrence Effect of Prison: Dynamic Theory and Evidence* (Aug. 2009) (*available at* http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1240&context=blewp) (last visited Oct. 12, 2009).

possess in determining the types and limits of punishments for crimes." *Solem*, 463 U.S. at 290. Accordingly, that the Eighth Amendment precludes a State from sentencing a non-homicide juvenile offender to life without parole does not preclude a State from meeting its goals of retribution or deterrence by sentencing such offenders to very long sentences – or even a life sentence, so long as there is some process at a later date that accounts for the fundamental differences between juveniles and adults.

More significantly, the Eighth Amendment does not preclude a State from imposing life without parole on a juvenile offender who commits a homicide. This is because society's interest in retribution against the homicide offender is different in kind, not just in degree, from its interest in retribution against the non-homicide offender given the "fundamental, moral distinction between a 'murderer' and a 'robber.'" *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2660 (2008) (quoting *Enmund v. Florida*, 458 U.S. 782, 797 (1982)); *see Harmelin*, 501 U.S. at 1004 (Kennedy, J., concurring) (murder is "a crime for which 'no sentence of imprisonment would be disproportionate'" (quoting *Solem*, 463 U.S. at 290 n.15)).[7] This is the basis for

---

[7] Even if the difference between a homicide and a violent non-homicide may occasionally turn on a "fortuity," Resp. Br. 18, society has made a judgment that a felony resulting in death is more serious and deserves greater punishment than a felony *not* resulting in death, as reflected by the widespread use of the felony-murder rule. *See* Joshua Dressler, *Understanding Criminal Law* § 31.06[B][3] (5th ed. 2009). In addition, unlike

(Continued on following page)

the Court's judgment that the Eighth Amendment bars the death penalty as a punishment for crimes that "did not result, *or* [were] not intended to result, in the death of the victim." *Id.* at 2650. Thus, the dictum in *Roper* that a juvenile offender who committed a homicide may be sentenced to life without parole is not contrary to the argument made in this case.[8]

---

with non-homicides, no national consensus exists that life without parole is disproportionate for a juvenile homicide offender, as the best estimates currently show that 42 States have actually imposed life-without-parole sentences on approximately 2500 juvenile homicide offenders, Human Rights Watch, *supra*, at 2-3 & Figure 1, whereas only 7 States have actually imposed such sentences on 107 juvenile non-homicide offenders, *see* pages 20, 23-26 *infra*.

[8] Just as the Court has drawn distinctions between those offenses that support the death penalty and those that do not in a narrow and sometimes incremental manner, *see Coker v. Georgia*, 433 U.S. 584 (1977) (declaring unconstitutional the death penalty for the rape of an adult woman); *Kennedy*, 128 S. Ct. at 2641 (31 years later declaring unconstitutional the death penalty for the rape of a child), the Court could rule narrowly in this case and hold only that petitioner's sentence of life without parole was unconstitutionally disproportionate for his first and only conviction of armed burglary, not for all non-homicide crimes. This narrower ruling would be confirmed by the undisputed fact that only two States permit such a punishment and only Florida has actually imposed it. *See* pages 20, 22, 26 *infra*.

B. Invalidating Petitioner's Sentence Will Not Require States To Create Any Particular Or Unworkable Sentencing Regime

A ruling prohibiting a sentence of life without parole for non-homicide juvenile offenders would be "workable." *Contra* Resp. Br. 60-63. Respondent, in fact, concedes that the ruling sought by petitioner would be "categorical." *Id.* at 60. That is, it would be a bright-line rule, far from the unworkable rule with "endless" permutations that respondent suggests. Categorically invalidating life-without-parole sentences for offenders of a set age (under 18) would not require extensive processes like those dictated by this Court's rejection of the death penalty for the insane or mentally retarded. And, with respect to the offense category (non-homicides), it is the same categorical distinction drawn in *Kennedy*, where the Court held that the death penalty for crimes against individuals must be reserved "for crimes that take the life of the victim." 128 S. Ct. at 2665.

Far from being unprecedented, this Court previously has required similar processes when there is a likelihood that the person has changed in ways relevant to the basis of his sentence or confinement. *See Ford v. Wainwright*, 477 U.S. 399, 413-417 (1986) (discussing minimum process required to determine that an offender is sufficiently sane to permit execution of the offender in accordance with the Eighth Amendment); *cf. Parham v. J.R.*, 442 U.S. 584, 607, 617 (1979) (holding that, at a minimum, "periodic

reviews" are required when child is committed to psychiatric hospital for indefinite period).

States can, and do, employ multiple permutations in sentencing juveniles without resorting to an unconstitutional punishment. Respondent could, for example, sentence a juvenile offender to a term of years that would expire before the end of a typical offender's expected natural life.

Alternatively, respondent could sentence a juvenile offender to a life sentence and also provide, after some term of years that vindicates society's interest in punishment, a state-initiated hearing to evaluate relevant factors such as maturity, future dangerousness, and fitness for return to society of the now-adult former juvenile offender. For example, Colorado recently enacted a law that provides that juveniles who have been convicted of a felony punishable by life imprisonment or death must be sentenced to life imprisonment with the possibility of parole after 40 years. *See* Colo. Rev. Stat. § 18-1.3-401(4)(b).

Likewise, the Eighth Amendment could be satisfied if, for example, juvenile offenders serving life were made eligible for parole under Florida's parole system that is still in place for those offenders convicted before Florida abolished parole.[9] That

---

[9] Respondent would not need to "recreate" the Parole Commission (Resp. Br. 62) as the Commission continues to hear cases involving inmates. Applying Florida's parole system to the 77 non-homicide juvenile offenders serving life without parole

(Continued on following page)

system includes objective parole guidelines and judicial review. *See* Fla. Stat. § 947.165; *Jackson v. Florida Parole & Probation Comm'n*, 429 So. 2d 1306, 1308 (Fla. Dist. Ct. App. 1983). And the decision-making process for release turns on whether the offender can be a "law-abiding person" whose "release will be compatible with his or her own welfare and the welfare of society." Fla. Stat. § 947.18. We do not suggest that Florida *must* apply its parole system to juvenile offenders like petitioner; it is one of many constitutional solutions.

Respondent raises the possibility of executive clemency or commutation. Resp. Br. 47, 62. But that alone does not remedy the unconstitutional nature of petitioner's life-without-parole sentence. Florida's executive clemency (like in many States) is a pure "act of mercy" that is vested in the "unfettered discretion" of the Governor and two members of the Cabinet. Fla. R. Executive Clemency §§ 1, 4. It does not require, after an appropriate period of punishment, that the Governor determine whether the

---

would have, at most, a marginal impact given that approximately 6,000 Florida inmates are currently eligible for parole and, last year alone, the Commission, made 1,795 parole determinations. *See* Florida Parole Comm'n, *2007-2008 Annual Report* 21 (*available at* http://fpc.state.fl.us/RP.htm) (last visited on Oct. 12, 2009). Further, the other six States that currently have juveniles serving life without parole sentences also have functioning parole systems. *See* Cal. Penal Code §§ 3044-3053; Del. Code tit. 11, §§ 4341-4353; Iowa Code §§ 904A.1-904A.6; La. Rev. Stat. §§ 15:574.2-574.13; Neb. Rev. Stat. §§ 83-188-83-196; S.C. Code §§ 24-21-10-24-21-90.

juvenile offender has matured so that his return to society will not impose any danger. And, even if the Governor voluntarily elects to be guided by that standard, his process is not currently structured to make a reliable determination to that effect. *See Ford*, 477 U.S. at 416 (holding that Florida's clemency process did not provide a reliable, neutral factfinding process sufficient for Eighth Amendment purposes for determining whether inmate was sufficiently sane to be executed); *see also District Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2319 (2009) ("We have held that noncapital defendants do not have a liberty interest in traditional state executive clemency, to which no particular claimant is *entitled* as a matter of state law.")

III. THE INTRA-STATE, INTER-STATE AND INTERNATIONAL COMPARISONS DEMONSTRATE THAT GRAHAM'S SENTENCE IS CRUEL AND UNUSUAL

Many numbers have been cited in this case to quantify the phenomenon of juvenile offenders sentenced to life without parole. The combined research of Florida and its amici have clarified, and not impugned, the constitutional significance of the following numbers:

- Number of States where a juvenile offender may theoretically be sentenced to life without parole for a non-homicide conviction: **38**

- Number of States, including Florida, where a juvenile offender is currently serving life without parole for solely non-homicide convictions: **7**

- Number of juvenile offenders nationally currently serving life without parole for solely non-homicide convictions: **107**

The numbers are even starker for a first conviction for armed burglary (the crime for which petitioner was sentenced to life without parole):[10]

- Number of States, including Florida, where a first conviction for armed burglary can result in life without parole for a juvenile offender: **2**

- Number of States, including Florida, where non-homicide juvenile offenders, without any prior convictions, are currently serving life without parole for a burglary or robbery offense: **1**

Because additional reports have been issued since the opening brief, and because respondent has offered an array of obfuscatory challenges to the relevant numbers, petitioner briefly addresses each of these sets of numbers.

---

[10] One amicus wrongly asserts that Graham had "a long record of prior offenses." Nat'l Dist. Attorney's Ass'n Amicus Br. 8. The armed burglary for which Graham is serving life without parole, along with the attempted armed robbery arising from the same incident (for which the statute authorizes a 15 year maximum sentence), are the first and only crimes of which Graham has ever been convicted. J.A. 440. Nor did Graham have any prior adjudications of delinquency in juvenile court. *Ibid.*

A. Petitioner's Life-Without-Parole Sentence For Armed Burglary Is Unusually Harsh Compared To Other Sentences Imposed By Florida

Life without parole is the harshest sentence any person, adult or juvenile, can receive for any non-homicide offense. Life without parole has not, however, been reserved by Florida for the worst crimes. Nor has it been authorized for crimes of greater consequence. Pet. Br. 61.

Respondent does not rebut the evidence showing that petitioner's sentence far exceeds the average sentence for a wide variety of offenses (many of which are more serious than armed burglary) imposed on both juvenile and adult offenders. For example, respondent does not refute that Graham's sentence is two times greater than the average sentence for murder and/or manslaughter for adult and juvenile offenders. Pet. Br. 58-59. Instead, respondent criticizes (Resp. Br. 35) the comparative data of other sentences for robbery and burglary in Florida because the data do not distinguish between degrees of those crimes. But that is the best that the respondent itself provides to the general public and, despite providing the Court with additional data from its Bureau of Research & Data Analysis (Resp. Br. 36, 51 n.31, 55), it does not provide the comparative numbers it views as material.

B. Although Most States Authorize Life Without Parole For Non-Homicide Juvenile Offenders, The Infrequent Use Of That Sentence Demonstrates That It Is Cruel And Unusual

The parties agree that there are 38 States in which a juvenile offender could, under some combination of circumstances, receive a sentence of life without parole for a non-homicide.[11] Even the amicus brief of Louisiana admits (at 33-34), that that number of States has shrunk in recent years. Further, neither respondent nor its amici contest that only two States (Florida and South Carolina) authorize life without parole for a first conviction of burglary.

---

[11] Petitioner stated in its opening brief that there were 36 such States, but as respondent (Resp. Br. 37-38 n.21) and its amicus (States of Louisiana *et al.* Amicus Br. 13-22) show, Arizona and Oregon also permit the imposition of a life-without-parole sentence on juveniles convicted of non-homicide offenses, although neither authorizes such a sentence for a burglary offense and neither State has imposed such a sentence. Our count of 38 states does not include Mississippi because, as we explained (Pet. Br. 63 n.18), although labeled "life without parole," the possibility of subsequent release after a term of years is available to people sentenced to life imprisonment, similar to the schemes in Colorado, Kentucky, and Texas. *See* States of Louisiana *et al.* Amicus Br. 23 & n.20. By contrast, unlike amici Louisiana *et al.* (at 11), we do include New Jersey because it is a State where life without parole is a potential sentence for juveniles convicted of certain serious felonies on three separate occasions prior to turning 18. *See* N.J. Stat. §§ 2A:4A-26, 2C:43-7.1(a).

But this tally of States where such a sentence might theoretically be imposed on a juvenile reveals very little of relevance to the Eighth Amendment inquiry. These provisions often cross-reference sentencing provisions without any indication of deliberate decision to incorporate sentences of life without parole for juvenile offenders. Consequently, they cannot be said to reflect the actual moral judgments of the state legislatures to incarcerate juveniles for their entire lives. *See Thompson*, 487 U.S. at 826-829 & nn.24-30 (plurality opinion); *id.* at 850-851 (O'Connor, J., concurring); No. 08-7621 Pet. Br. 46.

Petitioner in *Sullivan* has located statutes from only nine states that expressly set both the age and offense for sentences of life without parole. No. 08-7621 Pet. Br. 47-48 & n.60. Respondent Florida does not contest that these are the only such state statutes. No. 08-7621 Resp. Br. 32. A review of this limited number of statutes reveals that all but one of them either: (i) set the minimum age at 18 for a sentence of life without parole, (ii) contemplate such a sentence only for homicide juvenile offenders, or (iii) do both of these things. No. 08-7621 Pet. Br. 47-48.

Given the paucity of statutes setting an expressed minimum age for life without parole, statistics about the application of the States' laws in practice are a better measure of consensus than legislation. *See Kennedy*, 128 S. Ct. at 2657. The key numbers are the number of States in which non-homicide juvenile offenders are actually sentenced (7 States, including Florida) and the number of such

juvenile offenders actually sentenced in the entire nation (107 juvenile offenders, 77 of whom are incarcerated in Florida). *See* Paolo G. Annino, David W. Rasmussen, & Chelsea Rice, *Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to the Nation* 14 (updated Sept. 14, 2009) (*available at* http://www.law.fsu.edu/faculty/profiles/annino/Report_juvenile_lwop_092009.pdf) (last visited Oct. 12, 2009).[12]

Respondent is mistaken when it asserts that it is "not unusual for a juvenile in the United States to receive a life sentence, even for a non-homicide crime." Resp. Br. 39. Forty-three States (the 12 States that do not authorize life without parole for juveniles for non-homicides and the 31 States that do so only in

---

[12] Petitioner's opening brief indicated that there were six States. In the interim, Delaware reported sentencing one non-homicide juvenile offender to life without parole, raising to 7 the number of States and to 30 the total number of persons, outside of Florida, serving a life-without-parole sentence only for a non-homicide offense. *See* Annino, Rasmussen, & Rice, *supra*, at 2 n.8.

A recent report by The Sentencing Project is not to the contrary. *See* Ashley Nellis & Ryan S. King, The Sentencing Project, *No Exit, The Expanding Use of Life Sentences in America* (July 2009). The Sentencing Project report does not distinguish between non-homicide and homicide offenses, which is the basis of the numbers discussed above. Further, The Sentencing Project report relies on state definitions of juvenile, which can exclude 16 and 17 year olds, *see id.* at 16 n.9, unlike the Annino Study, which adopts a uniform definition of juvenile as a person under 18 years of age, *see* Annino, Rasmussen, & Rice, *supra*, at 3.

theory) do not sentence non-homicide juvenile offenders to life without parole. And in five additional States, there are six or fewer such offenders in each state, indicating that in 48 of the 50 states the practice is very infrequent. Annino, Rasmussen, & Rice, *supra,* at 14; *see Roper*, 543 U.S. at 564 (in examining consensus, combining States that did not authorize sentence with States in which even "without a formal prohibition * * * , the practice is infrequent").

If the absence of such sentences is based on the refusal of sentencing judges and juries to impose such sentences, that refusal is itself "a significant and reliable objective index of contemporary values." *Coker*, 433 U.S. at 596 (citation omitted). If the absence of such sentences is because "prosecutors rarely sought" such sentences, that "would tend to indicate that prosecutors, who represent society's interest in punishing crime, consider the [sentence] excessive" for juveniles convicted of non-homicide offenses. *Enmund*, 458 U.S. at 796.

The small number of offenders sentenced to life without parole compared to the total number of juveniles eligible for that offense, including the fact that 82% of States that authorize such sentences (31 out of 38) have not utilized that sentence, reflects the moral judgment of sentencers and prosecutors that this sentence is not appropriate. Such "infrequency [in application] makes it difficult to say that society approve[s]." *Lawrence v. Texas*, 539 U.S. 558, 569 (2003); *see Roper*, 543 U.S. at 567 ("the infrequency of

its use even where it remains on the books" is an "objective indicia of consensus").[13]

This is particularly true for armed burglary, the crime for which Graham was sentenced to life without parole. Only one other State (California) has sentenced a juvenile to life without parole for a similar type of non-homicide offense (robbery). *See* Annino, Rasmussen, & Rice, *supra,* at 6, 16. And under California law, unlike the Florida law under which Graham was sentenced, those offenders "must have served *three* or more prior separate prison terms," Cal. Penal Code § 667.7(a)(2) (emphasis added), in order to be eligible for a life-without-parole sentence. The five remaining States that have actually imposed a life without parole sentence on a non-homicide juvenile offender (Delaware, Iowa, Louisiana, Nebraska, and South Carolina) have imposed this sentence only for the crimes of rape and kidnapping. *See* Annino, Rasmussen, & Rice, *supra,* at 16.

---

[13] Given the rarity of such sentences for non-homicide, juvenile offenders in 48 of the 50 states, it is unlikely that state legislators—faced with a myriad of difficult problems—will expend their scarce legislative resources to enact a bill to provide relief to the very few, if any, non-homicide juvenile offenders serving such a sentence in their States. The fact that legislation providing relief for *all* juvenile offenders sentenced to life without parole has not passed in some States—where all or almost all of the pertinent offenders committed *homicides*—does not demonstrate that society favors imprisoning *non-homicide* juvenile offenders for their entire lives.

Respondent and its amici generally suggest that national numbers are inaccurate, but they do not point to any additional States that have imposed such a sentence or additional juveniles who have received such a sentence.[14] Instead, respondent objects because the reports from which these numbers are drawn

---

[14] Respondent's citation (Resp. Br. 39 n.23) to case law to support its claim that juveniles are sentenced to life without parole in additional States is faulty.

First, the prisoner in *Calderon v. Schribner*, No. 2:06-cv-00770, 2009 WL 89279 (E.D. Cal. Jan. 12, 2009), is one of four individuals sentenced to life without parole in California for a non-homicide juvenile offense. Second, in *State v. Standard*, 569 S.E.2d 325 (S.C. 2002), *cert. denied*, 537 U.S. 1195 (2003), the offender was sentenced to life without parole for a crime committed at age 20.

Third, the four other cases cited by respondent involved sentences that permitted parole. *See State v. Warren*, 887 N.E.2d 1145, 1147 n.2 (Ohio 2008) (noting opportunity of parole); *State v. Ira*, 43 P.3d 359, 367 (N.M. 2002) ("he does have the possibility of parole in this case"); *Hawkins v. Hargett*, 200 F.3d 1279, 1284 (10th Cir. 1999) (he "will be eligible for parole in approximately fifteen years"), *cert. denied*, 531 U.S. 830 (2000). Although not discussed in the opinion, the defendant in *State v. Green*, 502 S.E.2d 819 (N.C. 1998), *cert. denied*, 525 U.S. 1111 (1999), was eligible for release after 25 years despite being given a "life" sentence. *See State v. Smith*, 607 S.E.2d 607, 626 (N.C.) (Brady, J., concurring) (explaining that, for convictions occurring prior to 1998, a defendant sentenced to life imprisonment was entitled to "biennial review of [his] life sentence by a superior court judge after [he] had served twenty-five years of imprisonment"), *cert. denied*, 546 U.S. 850 (2005); *State v. Stinnett*, 497 S.E.2d 696, 701 (N.C. App.) ("a sentence of life imprisonment without parole may confine a defendant for his natural life or may amount to an active sentence of twenty-five years imprisonment"), *cert. denied*, 525 U.S. 1008 (1998).

have not been subject to "peer review." Resp. Br. 40. But the inquiry here is simply head counting, not complex statistical analysis. And the Annino Study, which is the most recent and comprehensive, drew its data from reports by the States themselves. *See* Annino, Rasmussen, & Rice, *supra,* at 9-13 (listing source of data for each State).

Respondent also suggests that the Annino Study may underreport the number of States because six States had not provided data to the study's authors. Resp. Br. 40. But an updated version of the Annino Study, issued contemporaneously to the filing of respondent's brief, now contains data from 47 of the 50 States. *See* Annino, Rasmussen, & Rice, *supra,* at 1. Two States that declined to release data regarding the number of juvenile offenders sentenced to life without parole in their prisons—Virginia and Utah, *see id.* at 12-13—have joined the amicus brief of Louisiana, and have not indicated that they have ever meted out that sentence to a non-homicide juvenile offender.

Notably, that amicus brief describes these sentences as "rare." States of Louisiana *et al.* Amicus Br. 8; *accord* Nat'l Dist. Attorney's Ass'n Amicus Br. 19 ("it is rare for a juvenile to receive an adult sentence of life without parole – even in Florida, the State where such sentences are the most common"). Indeed, the amicus briefs of Louisiana *et al.* and the National District Attorney's Association do not identify any incorrect data in the Annino Study, even though they represent 19 States and the largest

professional organization of state and local prosecutors.

Respondent also seeks to increase the number of non-homicide juvenile offenders in Florida who have received this sentence (but not the number of States that have imposed it) by suggesting that the Annino Study undercounts by excluding 73 juvenile offenders who were sentenced to life without parole for both non-homicide and homicide offenses. Resp. Br. 34. But those 73 offenders are properly excluded from the count for two overlapping reasons. First, virtually all of these offenders committed the homicide and non-homicide offenses at the same time, and given that a life-without-parole sentence is generally mandatory for a homicide, *see, e.g.*, Fla. Stat. § 775.082(1), the judge likely did not dwell independently on the appropriate sentence for the non-homicide offense. Second, were this Court to hold, consistent with petitioner's primary contention, that there is a distinction between crimes where the defendant caused or intended to cause death and all other crimes, then none of these 73 offenders would have the possibility of being released.

But even if the number of juvenile offenders sentenced to life without parole for non-homicides in these States were doubled, the constitutional result would be no different. This collection of juvenile offenders is cumulative of decades of sentencing. For example, the longest serving non-homicide juvenile

offender sentenced in Florida to life without parole committed his offense in 1973.[15] A few hundred juvenile offenders in seven States sentenced over the past 30 or 40 years to life without parole is the quintessential definition of an unusual sentence. *Cf. Enmund*, 458 U.S. at 795 ("there were 72 executions for rape in this country between 1955 and this Court's decision in *Coker v. Georgia* in 1977").

C. International Law And Practice Also Reflect The Cruel And Unusual Nature Of Sentencing Juveniles To Life Without Parole.

As respondent concedes (Resp. Br. 42), international law and practice can serve "as confirmation for the Court's determination about the evolving standards of decency in our own country." However, respondent suggests (Resp. Br. 44), and one of its amici asserts (Sixteen Members of Congress Amicus Br. 18-38), that Section 37(a) of the United Nations Convention on the Rights of the Child ("CRC"), which requires each country to "ensure" that "life imprisonment without the possibility of release shall [not] be imposed for offences committed by persons below eighteen years of age," United Nations Convention on Rights of the Child, Art. 37(a), U.N. Doc. A/44/736, 28 I.L.M. 1456, 1470 (Nov. 20, 1989), is not universally

---

[15] *See* http://www.dc.state.fl.us/AppCommon/ (last visited on Oct. 12, 2009). At this Florida Department of Corrections webpage, one can locate Robert Saunder's offender profile by typing his DC number (165371).

adhered to in other countries' domestic law and practice.

But it is shared ground that 193 countries have become parties to the CRC and that the CRC establishes an oversight committee to determine whether a country "employs [life without parole] or allows for its use in its domestic law." Sixteen Members of Congress Amicus Br. 20, 25-26. According to respondent's amicus, that oversight committee identified 11 countries of which (with significant overlap) 8 authorized capital punishment on juveniles and 8 authorized life without parole sentences on juveniles. *Id.* at 26-31.[16] Even accepting the accuracy of amicus' description, which seems in some instances contrary to the text and context of the reports it summarizes,[17] that simply demonstrates that some countries are still striving to meet their international obligations regarding both capital punishment and life-without-parole sentences for juveniles. And amicus does not point to one actual individual outside the United States who is currently serving a life-without-parole sentence for offenses committed while a juvenile, much less for non-homicide offenses.

---

[16] Those eleven countries are Bangladesh, Belize, Burkina Faso, Dominica, Gambia, Guatemala, Kenya, Liberia, Niger, Saudi Arabia, and St. Lucia.

[17] A country-by-country rebuttal to the claims by this amicus has been published by the authors of the Amnesty International *et al.* amicus brief. *Available at* http://www.law.usfca.edu/centers/documents/grahamresponse.pdf (last visited on Oct. 14, 2009).

Amicus' description of these reports certainly does not draw into question the overwhelming rejection of life-without-parole sentences for juveniles in the international community, particularly in those countries such as the United Kingdom, *see* Amnesty Int'l *et al.* Amicus Br. 32-38, which are of particular importance because they share a common legal heritage with the United States, *see Roper*, 543 U.S. at 577.

CONCLUSION

This Court should reverse the judgment of the Florida First District Court of Appeal with instructions to vacate petitioner's life-without-parole sentence, and remand the case for further proceedings.

Respectfully submitted,

DREW S. DAYS, III
BRIAN R. MATSUI
SETH M. GALANTER
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, D.C. 20006

GEORGE C. HARRIS
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105

BRYAN S. GOWDY
Counsel of Record
JOHN S. MILLS
REBECCA BOWEN CREED
JESSIE L. HARRELL
MILLS CREED & GOWDY, P.A.
865 May Street
Jacksonville, FL 32204
(904) 350-0075

Attorneys for Petitioner

OCTOBER 14, 2009

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JUL 2 3 2009
OFFICE OF THE CLERK

No. 08-7412, No. 08-7621

In The
Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writs of Certiorari
To The District Court of Appeal,
First District, State Of Florida

BRIEF OF *AMICI CURIAE* J. LAWRENCE ABER, MARC S. ATKINS, CAMILLA P. BENBOW, MARY M. BRABECK, JEROME BRUNER, HARDIN L.K. COLEMAN, JANE C. CONOLEY, KENNETH A. DODGE, MICHELLE FINE, DOUGLAS FUCHS, LYNN S. FUCHS, FRANCES M. JENSEN, BRINTON LYKES, JACQUELINE MATTIS, PEDRO NOGUERA, ISAAC PRILLELTENSKY & NIOBE WAY IN SUPPORT OF PETITIONERS

STEPHEN M. NICKELSBURG*
SARAH BLACKMAN†
CLIFFORD CHANCE US LLP
2001 K Street NW
Washington DC 20006-1001
(202) 912-5000

Counsel for Amici Curiae
*Counsel of Record

July 23, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

†Admitted in New York; practice supervised by a member of the District of Columbia Bar.

QUESTION PRESENTED

Whether the Eighth Amendment's ban on cruel and unusual punishments prohibits the imprisonment of a juvenile for life without the possibility of parole as punishment for the juvenile's commission of a non-homicide.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 10

ARGUMENT 12

I. SCIENTIFIC AND ACADEMIC RESEARCH CONTINUES TO CONFIRM POST-*ROPER* THAT ADOLESCENTS ARE CATEGORICALLY LESS MATURE AND MORE PRONE TO ENGAGE IN RISKY BEHAVIORS THAN ADULTS. 12

A. Adolescents Engage in Risky Behavior. 13

B. Adolescents Take More Risks in Part Due to Differences in Neurological Development. 14

II. THE ADOLESCENT BRAIN IS PLASTIC, RENDERING ADOLESCENTS HIGHLY SUSCEPTIBLE TO OUTSIDE INFLUENCES (INCLUDING PEER PRESSURE AND ENVIRONMENTAL STRESSES) YET CAPABLE OF ENORMOUS CHANGE THROUGH REHABILITATION 22

A. Adolescents Are Unusually Susceptible to Peer Influence 22

B. Adolescents Are Highly Influenced by — and Live at the Mercy of — Psychosocial Conditions, Socio-Economic Variables, and Other Environmental Factors. 25

C. Rehabilitation in Adolescents Is Highly Effective. 28

III. ADOLESCENTS ARE FAR LESS CAPABLE THAN ADULTS TO AID IN THEIR DEFENSE BEFORE AND DURING TRIAL.. 31

CONCLUSION 36

TABLE OF AUTHORITIES

Page

CASES:

Drope v. Missouri, 420 U.S. 162 (1975).....31

Dusky v. United States, 362 U.S. 402 (1960) 31

Harmelin v. Michigan, 501 U.S. 957 (1991) 1

In re Gault, 387 U.S. 1 (1967) 32, 33

Powell v. Alabama, 287 U.S. 45 (1932) 33

Roper v. Simmons, 543 U.S. 551 (2005) .....*passim*

Thompson v. Oklahoma, 487 U.S. 815 (1988) 13

OTHER AUTHORITIES:

Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992) 13

Amy F. T. Arnsten & Rebecca M. Shansky, *Adolescence: Vulnerable Period for Stress-Induced Prefrontal Cortical Functioning?*, 1021 ANNALS N.Y. ACAD. SCI. 143 (2004) 21

Mary Beckman, *Crime, Culpability, and the Adolescent Brain*, 305 SCIENCE 596 (2004) ... 17, 21

James M. Bjork et al., *Developmental Differences in Posterior Mesofrontal Cortex Recruitment by Risky Rewards*, 27 J. NEUROSCIENCE 4839 (2007) 18

Sarah-Jayne Blakemore & Suparna Choudhury, *Development of The Adolescent Brain: Implications for Executive Function and Social Cognition*, 47 J. CHILD PSYCHOL. & PSYCHIATRY 296 (2006) 15

Robert W. Blum et al., *The Effects of Race/Ethnicity, Income, and Family Structure on Adolescent Risk Behaviors*, 90 AM. J. PUB. HEALTH 1879 (2000) 14

ROBERT JOSEPH BURSIK, JR. & HAROLD G. GRASMICK, NEIGHBORHOODS AND CRIME (1993) 27

EMILY BUSS, THE ROLE OF LAWYERS IN PROMOTING JUVENILES' COMPETENCE AS DEFENDANTS (R. G. Schwartz ed., 2000) 34

B.J. Casey et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62 (2008) ..... *passim*

Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, DEVELOPMENTAL PSYCHOL. (forthcoming 2009) 20

Linda S. Chan, et al., Evidence Report/Technology Assessment No. 107, *Preventing Violence and Related Health-Risking Social Behaviors in Adolescents* (Oct. 2004) 30

Coalition for Juvenile Justice, *Applying Research to Practice: What Are the Implications of Adolescent Brain Development for Juvenile Justice* (May 5, 2006) 17, 21

CONDUCT PROBLEMS PREVENTION RESEARCH GROUP, *Fast Track Randomized Controlled Trial to Prevent Externalizing Psychiatric Disorders: Findings From Grades 3 to 9*, 46 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (2007) 30

Heather M. Conklin et al., *Working Memory Performance in Typically Developing Children and Adolescents: Behavioral Evidence of Protracted Frontal Lobe Development*, 31 DEVELOPMENTAL NEUROPSYCHOL. 103 (2007) 16

Philip Cook et al., *The Negative Impact of Starting Middle School in Sixth Grade*, 27 J. POL'Y ANALYSIS & MGMT. 104 (2008) 24

Eveline A. Crone & Maurits W. van der Molen, *Developmental Changes in Real Life Decision Making: Performance on a Gambling Task Previously Shown to Depend on the Ventromedial Prefrontal Cortex*, 25 DEVELOPMENTAL NEUROPSYCHOL. 251 (2004) 19

Kenneth A. Dodge, *Translational Science in Action: Hostile Attributional Style and the Development of Aggressive Behavior Problems*, 18 DEV. & PSYCHOPATHOLOGY 791 (2006) 26

Kenneth A. Dodge et al., *Aggression and Antisocial Behavior in Youth*, *in* 3 HANDBOOK OF CHILD PSYCHOLOGY: SOCIAL, EMOTIONAL, AND PERSONALITY DEVELOPMENT 719 (6th ed., 2006). 26

DEVIANT PEER INFLUENCES IN PROGRAMS FOR YOUTH (KENNETH A. DODGE, THOMAS J. DISHION & JENNIFER E. LANSFORD EDS., 2006) 24

Sanford M. Dornbusch et al., *The Relation of Family and School Attachment to Adolescent Deviance in Diverse Groups and Communities*, 16 J. ADOLESCENT RES. 396 (2001) 27

Thomas J. Eluvathingal, *Quantitative Diffusion Tensor Tractography of* ASSOCIATION *and Projection Fibers in Normally Developing Children and Adolescents*, 17 CEREBRAL CORTEX 2760 (2007) 16

Kristan Glasgow Erickson et al., *A Social Process Model of Adolescent Deviance: Combining Social Control and Differential Association Perspectives*, 29 J. YOUTH & ADOLESCENCE 395 (2000)..... 24

Neir Eshel, et al., *Neural Substrates of Choice Selection in Adults and Adolescents: Development of the Ventrolateral Prefrontal and Anterior Cingulate Cortices,* 45 NEUROPSYCHOLOGIA 1270 (2007) 18

Jeffrey Fagan, *Atkins, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment,* 33 N.M. L. Rev. 207 (2003) 28

RONALD A. FELDMAN ET AL., THE ST. LOUIS CONUNDRUM: THE EFFECTIVE TREATMENT OF ANTISOCIAL YOUTHS (1983) 24

Michelle Fine & Jessica Ruglis, *Circuits and Consequences of Dispossession: The Racialized Realignment of the Public Sphere for U.S. Youth,* 17 TRANSFORMING ANTHROPOLOGY 20 (2009) 14

Lawrence B. Finer & Stanley K. Henshaw, *Disparities in Rates of Unintended Pregnancy in the United States, 1994 and 2001,* 38 PERSP. ON SEXUAL REPROD. HEALTH 90 (2006) 13

Paul J. Frick, *Effective Interventions for Children and Adolescents With Conduct Disorder,* 46 CANADIAN. J. PSYCHIATRY 597 (2001) 30

Adriana Galvan et al., *Earlier Development of the Accumbens Relative to Orbitofrontal Cortex Might Underlie Risk-Taking Behavior in Adolescents*, 26 J. NEUROSCI. 6885 (2006) 18

Adriana Galvan et al., *Risk-Taking and the Adolescent Brain: Who is at Risk?*, 10 DEVELOPMENTAL SCI. F-8 (2007) 18

Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking*, 41 DEVELOPMENTAL PSYCHOL. 625 (2005) 22

Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 ANNALS N.Y. ACAD. SCI. 77 (2004) 15

Jay N. Giedd, *The Teen Brain: Insights from Neuroimaging*, 42 J. ADOLESCENT HEALTH 335 (2008) 17

Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174 (May 25, 2004) 17

THOMAS GRISSO & ROBERT G. SCHWARTZ, YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE (2000) 32

Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980) 35

Marie-Helene Grosbras et al., *Neural Mechanisms of Resistance to Peer Influence in Early Adolescence*, 27 J. NEUROSCI. 8040 (2007) 24

Stephanie M. Holm et al., *Reward-Related Brain Function and Sleep in Pre/Early Pubertal and Mid/Late Pubertal Adolescents*, J. ADOLESCENT HEALTH (forthcoming 2009) 19

Catalina J Hooper et al., *Adolescents' Performance on the Iowa Gambling Task: Implications for the Development of Decision Making and Ventromedial Prefontal Cortex*. 40 DEVELOPMENTAL PSYCHOL. 1148 (2004) 20

Eric L. Jensen, *The Waiver of Juveniles to Criminal Court: Policy Goals, Empirical Realities, and Suggestions for Change*, 31 IDAHO L. REV. 173 (1994-95)..... 22

Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 CRIME & DELINQUENCY 96 (1994) 22

Ann E. Kelley et al., *Risk Taking and Novelty Seeking in Adolescence*, 1021 ANNALS N.Y. ACAD. SCI. 27 (2004) 23

Deanna Kuhn, *Do Cognitive Changes Accompany Developments in the Adolescent Brain?*, 1 PERSP. ON PSYCHOL. SCI. 59 (2006) 15

Scott C. Matthews et al., *Selective Activation of the Nucleus Accumbens During Risk-Taking Decision Making*, 15 NEUROREPORT 2123 (2004) 18

H. Naci Mocan & Daniel I. Rees, *Economic Conditions, Deterrence and Juvenile Crime: Evidence from Micro Data*, 7 AM. L. ECON. REV. 319 (2005) 27

Eve K. Moscicki, *Epidemiology of Completed and Attempted Suicide: Toward a Framework for Prevention*, 1 CLINICAL NEUROSCI. RES. 310 (2001) 14

NATIONAL RESEARCH COUNCIL, INSTITUTE OF MEDICINE & TRANSPORTATION RESEARCH BOARD, PREVENTING TEEN MOTOR CRASHES: CONTRIBUTIONS FROM BEHAVIORAL AND SOCIAL SCIENCE, WORKSHOP REPORT (2007) 14

DEBRA NIEHOFF, THE BIOLOGY OF VIOLENCE: HOW UNDERSTANDING THE BRAIN, BEHAVIOR, AND ENVIRONMENT CAN BREAK THE VICIOUS CIRCLE OF AGGRESSION (1999) 25

Jari-Erik Nurmi, *Age, Sex, Social Class, and Quality of Family Interaction as Determinants of Adolescents' Future Orientation: A Developmental Task Interpretation*, 22 ADOLESCENCE 977 (1987) 28

Bruce D. Perry, Inaugural Lecture at the Margaret McCain Lecture Series: Maltreatment and the Developing Child: How Early Childhood Experience Shapes Child and Culture (Sept. 23, 2005) 25, 26, 29

Michele Peterson-Badali et al., *Young People's Experience of the Canadian Youth Justice Systems: Interacting with Police and Legal Counsel*, 17 BEHAV. SCI. & L. 455 (1999) 34

Alex R. Piquero et al., *The Criminal Career Paradigm*, 30 CRIME & JUST. 359 (2003) 14

R. M. Post, *Transduction of Psychosocial Stress into the Neurobiology of Recurrent Affective Disorder*, 149 AM. J. PSYCHIATRY 999 (1992) 25

PRESIDENT'S NEW FREEDOM COMM'N ON MENTAL HEALTH, ACHIEVING THE PROMISE: TRANSFORMING MENTAL HEALTH CARE IN AMERICA (2003) 30

REPORT OF THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967)..... 32

Katya Rubia et al., *Progressive Increase of Frontostriatal Brain Activation from Childhood to Adulthood During Event-Related Tasks of Cognitive Control*, 27 HUM. BRAIN MAPPING 973 (2006) 20

Jane Rutherford, *Community Accountability for the Effect of Child Abuse on Juvenile Delinquency in the Brave New World of Behavioral Genetics*, 56 DEPAUL L. REV. 949 (2007) 26

Robert J. Sampson & John H. Laub, *Urban Poverty and the Family Context of Delinquency: A New Look at Structure and Process in a Classic Study*, 65 CHILD DEV. 525 (1994) 14

Robert J. Sampson & John H. Laub, *A Life-Course View of the Development of Crime*, 602 ANNALS AM. ACAD. POL. & SOC. SCI. (2005) 30

Robert J. Sampson et al., *Durable Effects of Concentrated Disadvantage on Verbal Ability Among African-American Children*, 105 PROC. NAT'L ACAD. SCI. 845 (2008) 34

Melinda G. Schmidt et al., *Effectiveness of Participation as a Defendant: The Attorney-Juvenile Client Relationship*, 21 BEHAV. SCI. & L. 175 (2003) 34, 35

Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793 (2005) 33

ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE (2008) 23, 29

Linda P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCI. & BIOBEHAV. REVIEWS, 417 (2000) 15, 16

Laurence Steinberg, *Risk Taking in Adolescence: What Changes and Why?*, 1021 ANNALS N.Y. ACAD. SCI. 51 (2004) 19

Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-taking*, 28 DEVELOPMENTAL REV. 78 (2008) 13

Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28 (2009) 20, 28

Laurence Steinberg et al., *Reentry of Young Offenders from the Justice System: A Developmental Perspective*, 2 YOUTH VIOLENCE & JUVENILE JUST. 21 (2004) 33

Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 459 (2009) 20, 33

Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009 (2003) ..... *passim*

Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCHOL. 1531 (2007) 23

Terence P. Thornberry et al., *The Role of Juvenile Gangs in Facilitating Delinquent Behavior*, 30 J. RES. CRIME & DELINQUENCY 55 (1993) 24

Patrick H. Tolan et al., *The Developmental Ecology of Urban Males Youth Violence*, 39 DEVELOPMENTAL PSYCHOL. 274 (2003) 14

UNDERSTANDING PEER INFLUENCE IN CHILDREN AND ADOLESCENTS (MITCHELL J. PRINSTEIN & KENNETH A. DODGE EDS., 2008) 24

U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATION IN THE UNITED STATES, 1995 (1997) 29

U.S. PUB. HEALTH SERV., YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL (WASHINGTON, DC 2001) 31

Shavaun M. Wall & Mary Furlong, *Comprehension of Miranda Rights by Urban Adolescents with Law-Related Education*, 56 PSYCHOL. REP. 359 (1985) 33

Cathy Spatz Widom, *The Cycle of Violence*, 244 SCIENCE 4901 (1989) 28

Cathy S. Widom & Michael G. Maxfield, *An Update on the "Cycle of Violence"*, NAT'L INSTITUTE JUST. RES. BRIEF, FEB. (2001) 27

John Paul Wright & Francis T. Cullen, *Parental Efficacy and Delinquent Behavior: Do Control and Support Matter?*, 39 CRIMINOLOGY 677 (2001) 28

INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae are an interdisciplinary group of psychologists, social scientists, and neuroscientists who have devoted their careers to the study of adolescent development and behavior. *Amici* respectfully submit this Brief to bring to the attention of the Court the overwhelming body of academic and professional literature and scientific evidence demonstrating — consistent with everyday experience and common sense — that an adolescent is fundamentally different in critical respects than he or she will be at the age of maturity and beyond. Although adolescents must be held responsible for their actions, they generally lack mature decisionmaking capability, have an inflated appetite for risk, are prone to influence by peers, and do not accurately assess future consequences. At the same time, adolescents' minds and selves are highly malleable and capable of enormous change. Indeed, professional interventions with even seriously antisocial adolescents show that deviant behavior in youth can be abated, a phenomenon that is far less common among adults.

For these reasons, although *Amici* recognize that the Court has held that a sentence of life imprisonment without parole is within the judgment of the legislature to authorize or mandate for crimes committed by adults,[2] *Amici* submit that the same

---

[1] Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party authored this Brief in whole or in part, and no person or entity other than *Amici* made a monetary contribution to fund or intended to fund the preparation or submission of this Brief. Counsel of record for all parties have consented to the filing of this Brief, and letters of consent have been filed with the Clerk.

[2] *Harmelin v. Michigan*, 501 U.S. 957 (1991).

sentence is categorically different for adolescents.[3] It is inherently cruel to lock up an adolescent and throw away the key, in disregard of the person's immaturity and the character-transforming changes that are virtually certain to occur in his or her near lifetime. *Amici* submit that the fundamental principles of justice and dignity embodied in the Eighth Amendment bar the State from condemning an adolescent to spend the rest of his or her life in prison with no possibility of parole.

Individual *Amici* are as follows:

- *J. Lawrence Aber* is Professor of Applied Psychology and Public Policy at the Steinhardt School of Culture, Education, and Human Development at New York University. He also is a Director of the Children's Institute at the University of Cape Town, South Africa. He is an internationally recognized expert in child development and social policy and testifies frequently before Congress, state legislatures, and other deliberative bodies. Professor Aber's research examines the influence of poverty and violence at the family and community levels on the social, behavioral, and cognitive development of children and youth. He also has designed and conducted evaluations of a variety of programs for children and youth, including violence prevention, literacy development, and antipoverty initiatives.
- *Marc S. Atkins* is Professor of Psychology in Psychiatry and Director of Psychology Training at the Institute for Juvenile Research at the University of Illinois at Chicago. Professor Atkins is a leading researcher on the development of

---

[3] *See Roper v. Simmons*, 543 U.S. 551 (2005).

school-based mental health services in urban and high-poverty communities. He has published extensively on children's mental health. He is a consultant to the Chicago Public Schools and the Illinois Department of Mental Health.

- *Camilla P. Benbow* is Patricia and Rodes Hart Dean of Education and Human Development at Vanderbilt University's Peabody College. Dr. Benbow is a member of the Board of the American Psychological Association and is a co-founder and co-chair of the committee of AAU College of Education Deans. Her scholarship focuses on developmental psychology, precocity, and educational policy. She has authored or co-authored more than 100 articles and thirty-five book chapters, and she is the editor of the journals *Intellectual Talent: Psychometric and Social Issues* and *Academic Precocity: Aspects of its Development.* Dr. Benbow is vice-chair of the National Mathematics Advisory Panel and a member of the National Science Board.

- *Mary M. Brabeck* is Professor and Dean of the Steinhardt School of Culture, Education, and Human Development at New York University and Fellow of the American Psychological Association. Dr. Brabeck is a scholar and leader in the fields of applied and developmental psychology. Her research focuses on intellectual and ethical development, values and conceptions of the moral self, and professional ethics. She has published more than ninety journal articles and book chapters and is an editorial board member of several journals, including the *Peabody Journal of Education.*

- *Jerome Bruner* is Research Professor of Psychology and Senior Research Fellow in Law at New York University. Dr. Bruner has been a leader in the development of the theory of cognitive psychology throughout his more than sixty-year career. He founded the Center for Cognitive Studies at Harvard University. He has conducted groundbreaking research into childhood learning and perception, which has been highly influential in the educational reform movement of the past quarter century. Dr. Bruner has published numerous articles and books, including *The Culture of Education, Toward a Theory of Instruction,* and *The Process of Education.* He has served on the U.S. President's Science Advisory Committee and as the President of the American Psychological Association, and has received many honors and awards, including the International Balzan Prize (for his lifelong contribution to the understanding of the human mind), the CIBA Gold Medal for Distinguished Research, and the Distinguished Scientific Award of the American Psychological Association.

- *Hardin L.K. Coleman* is Dean of the School of Education and Professor of Counseling Psychology at Boston University. Dr. Coleman's research focuses on socio-cultural factors in minority student achievement and the use of developmental guidance to promote social and emotional intelligence in children. Dr. Coleman has published in a variety of journals including *The Counseling Psychologist* and *The Professional School Counselor.* He has co-edited several handbooks, including *The Handbook of School Counseling.* Dr. Coleman has served as a

consultant and trainer for numerous schools and mental health agencies.

- *Jane C. Conoley* is Professor and Dean at Gevirtz Graduate School of Education at the University of California, Santa Barbara, and the former Dean of Education at Texas A&M University. Her research focuses on psychological and educational measurement. Dr. Conoley is the author or editor of twenty books and seventy articles and book chapters, and serves on ten editorial boards. She has received numerous research, teaching and service honors, and has been recognized by the American Psychological Association for outstanding service to the profession.
- *Kenneth A. Dodge* is William McDougall Professor of Public Policy, Professor of Psychology and Neuroscience, and Director of the Center for Child and Family Policy at Duke University. He has been recognized with a Senior Scientist Award by the National Institutes of Health and the Distinguished Scientific Award by the American Psychological Association. His scholarship addresses the development and prevention of chronic violence in children and adolescents, including the biological, early family experience, peer relations, and social-cognitive factors that serve as catalysts for aggressive behavioral development. He has published extensively on these topics, including more than 250 scientific articles on clinical and developmental psychology, and is one of the most cited scientists in his field. Professor Dodge created the Fast Track Program, a comprehensive effort that has been found to prevent serious and chronic violence in high-risk youth.

- *Michelle Fine* is Distinguished Professor of Social Psychology, Women's Studies, and Urban Education at the Graduate Center at the City University of New York. She is the author of numerous award-winning books in the fields of education and psychology and is co-editor of NYU Press' Qualitative Studies in Psychology Series. Professor Fine's research on urban youth in schools, communities and prisons and on social justice has been funded by the Spencer Foundation, Surdna Foundation, Ford Foundation, Open Society Foundation and Carnegie Foundation.

- *Douglas Fuchs* is Professor and Nicholas Hobbs Chair in Special Education and Human Development at Vanderbilt University's Peabody College. He also is co-director of the Vanderbilt Kennedy Center Reading Clinic and has been principal investigator on thirty-five federally-sponsored research projects. Dr. Fuchs' research focuses on the effects of poverty and disability on students, school improvement and school reform, urban education, and special education policy. He has authored more than 200 articles, has been identified by Thompson ISI as one of 250 "most highly cited" researchers in the social sciences, and has won "best paper" awards for numerous publications. From 1987 to 2002, he was co-editor of *The Journal of Special Education.*

- *Lynn S. Fuchs* is Professor and Nicholas Hobbs Chair in Special Education and Human Development at Vanderbilt University's Peabody College. Dr. Fuchs is a nationally recognized expert on the cognitive predictors of responsiveness to intervention. She has written

and published more than 200 studies, has been identified by Thompson ISI as one of 250 "most highly cited" researchers in the social sciences, and sits on the editorial boards of ten journals, including the *Journal of Educational Psychology.*

- *Frances Jensen* is Professor of Neurology at Harvard Medical School's Department of Neurology and Director of Translational Neuroscience, Director of Epilepsy Research at Children's Hospital Boston, and Senior Associate Physician in Neurology at Children's Hospital Boston and Brigham and Women's Hospital. Dr. Jensen's research focuses on age-specific mechanisms in the developing brain related to stroke and epilepsy, as well as brain plasticity. In 2007, she received a Pioneer Award from the National Institute of Health to explore the interaction between epileptogenesis and cognitive dysfunction. Dr. Jensen has presented extensively on research into adolescent brain development. She is currently on the Governing Board of the American Epilepsy Society as well as the Governing Council for the Society for Neuroscience.

- *M. Brinton Lykes* is Associate Director of the Center for Human Rights and International Justice at Boston College, where she also is Professor of Community-Cultural Psychology. Dr. Lykes has worked for many years among child survivors of war and state-sponsored economic and political violence in Guatemala and South Africa. Dr. Lykes' research includes community and cultural psychology, human rights policy, and mental health. She has served as a Fellow of the American Psychological Association and Chair of

the Committee on International Relations in Psychology.

- *Jacqueline Mattis* is Associate Professor of Applied Psychology and Department Chair at New York University's Steinhardt School of Culture, Education, and Human Development. Her work focuses on religiosity and spirituality in African American culture, with emphasis on how religion and spirituality inform prosocial development. She has received numerous awards for her scholarship, including the 2001 Positive Psychology Young Scholars Award.

- *Pedro Noguera* is Professor of Teaching and Learning at the Steinhardt School of Culture, Education, and Human Development at New York University. Dr. Noguera has served as Executive Director of the Metropolitan Center for Urban Education and as co-director of the Institute for the Study of Globalization and Education in Metropolitan Settings. Professor Noguera's research focuses on the influence of social and economic conditions in the urban environment on schools. He also has conducted research into education and social conditions throughout the world, including in the Caribbean and Latin America. Professor Noguera has published over 100 works on youth violence, urban public schools, and race and ethnic relations in American society. He has served as a member of the U.S. Public Health Service Centers for Disease Control Taskforce on Youth Violence and on many advisory boards.

- *Isaac Prilleltensky* is The Erwin and Barbara Mautner Chair in Community Well-Being, Dean of the University of Miami School of Education and

Professor of Educational and Psychological Studies. He is a leader in the field of community psychology and has written numerous works regarding the link between psychology and social justice. Dr. Prilleltensky's scholarship focuses on community psychology, the prevention of child abuse, the promotion of mental health and social well-being, and organizational change in the not-for-profit sector. Dr. Prilleltensky is a Fellow of the American Psychological Association and of the American Educational Research Association. In 2002 he was a Visiting Fellow of the British Psychological Society. He has written or co-edited seven books and more than 100 articles and book chapters on child, family, and community well-being. Dr. Prilleltensky sits on the board of several psychology journals.

- *Niobe Way* is Professor of Applied Psychology at New York University and President-Elect of the Society For Research on Adolescence. She is the author of numerous journal articles and award-winning books in the field of psychology. Dr. Way's research focuses on the social and emotional development of urban youth and the ways in which the school and family contexts shape developmental trajectories. She serves on the editorial boards of numerous journals focusing on child and adolescent development and served as Associate Editor of the Journal of Adolescent Research. Her work has been funded by the National Science Foundation, The National Institute of Mental Health, The Spencer Foundation, and The W.T. Grant Foundation.

SUMMARY OF ARGUMENT

A sentence of life without parole usually reflects society's conclusion that an offender's culpability is so great, the benefit of deterrence so high, and the potential for change and rehabilitation so low that the person must be incapacitated for the rest of his or her days. The overwhelming body of scientific and academic study shows that these conclusions cannot be drawn with any degree of certainty for adolescents as a class, including adolescents who commit serious crimes. This body of work, which has only deepened since the Court relied upon it in *Roper v. Simmons*, demonstrates that the principal purposes of sentencing — punishing the culpable and deterring the rational — are not furthered by denying the possibility of parole to adolescents. Denying the possibility of parole also irrationally ignores the fact that adolescents as a class are substantially more likely than adults to change, transform, and rehabilitate during their remaining lifetimes — especially if they are subject to appropriate social interventions.

This Brief focuses on the state of the science regarding the neurological, physiological, psychological, and emotional development of adolescents. *First*, medical research and scientific studies continue to confirm post-*Roper* that human brain development occurs in distinct phases, with critical immaturities in judgment persisting throughout adolescence. In particular, the brain's frontal lobes are developing throughout the teen years, leading to fundamental differences between the decisionmaking ability of adolescents and adults. Adolescent brains also have a heightened sensitivity to immediate rewards, a deficit in sensitivity to long-

term risks, and immature psychosocial controls that make adolescents less able than adults to balance benefits and risks properly. These developmental and biological characteristics render adolescents categorically less culpable for the deficient decisions they make and diminish the deterrent effect of subjecting adolescents to the most severe adult punishments.

Second, adolescents are substantially more influenced than adults by peer pressure to engage in risky behaviors, as well as by environmental factors over which they have little control. Indeed, adolescents' underdeveloped psychosocial functions and reduced impulse control make them especially vulnerable to peer pressure and outside influences. This elevated susceptibility to negative pressures and influences renders adolescents less culpable for their decisions. It also is highly likely to change or be outgrown over time.

Third, adolescents are capable of enormous change. The Court recognized in *Roper* that the reckless and impetuous behavior of adolescents subsides with maturity, in part as a result of growth and development in the brain and in sense of self. Recent empirical studies have confirmed the effectiveness of rehabilitation for adolescents, including for adolescents who commit serious crimes. Specifically, studies show that adolescents' recidivism rate decreases when rehabilitative programs are provided, a finding that is less frequent with adults. In short, the same immaturity and brain plasticity that render youth more vulnerable to outside influences also make them highly receptive to rehabilitation.

Fourth, to the extent society depends on the protections of the legal process to identify and account for adolescent deficiencies and capabilities on a case-by-case basis, research shows that adolescents are far less capable than adults of participating effectively in legal proceedings, including by relating to and communicating with authority figures such as the police, judges, and even their own counsel. One cannot assume that the system will fairly and accurately identify only those thirteen- to seventeen-year-olds who are most deserving of the most severe punishments. Independent judgment regarding the constitutional acceptability of the punishment is required.

In sum, the purposes of a sentence of life without the possibility of parole are not served by imposing that sentence on adolescents. Consequently, a sentence of life without the possibility of parole cannot be said to be proportionate or fair in this context. For these reasons, *Amici* respectfully submit that the judgments of the courts below should be reversed.

ARGUMENT

I. SCIENTIFIC AND ACADEMIC RESEARCH CONTINUES TO CONFIRM POST-*ROPER* THAT ADOLESCENTS ARE CATEGORICALLY LESS MATURE AND MORE PRONE TO ENGAGE IN RISKY BEHAVIORS THAN ADULTS.

In *Roper* the Court relied upon scientific and academic studies in determining that certain punishments appropriate for adults do not necessarily fit adolescents. *Roper* prohibited the death penalty for all juveniles based in part on studies demonstrating that youths exhibit pronounced differences from adults — including a

lack of maturity, an underdeveloped sense of responsibility, heightened vulnerability to negative influences, still-developing character, and transitory personality traits. As a result of each of these factors, the Court concluded that adolescents' decisionmaking processes are inherently less reliable than those of adults and do not necessarily reflect the decisionmaking processes that the same individuals will exhibit upon maturity.[4] Consequently, although responsible for their actions, adolescents are generally less culpable than fully-mature adults, and "cannot with reliability be classified among the worst offenders" deserving of the most severe punishments.[5] Research since *Roper* only reinforces those conclusions.

A. Adolescents Engage in Risky Behavior.

Society has long understood that adolescents in their formative years lack the experience, perspective, and judgment expected of adults.[6] Indeed, adolescents' elevated appetite for risky behaviors has been widely observed.[7] Statistics support that observation and show that adolescents are far more likely than adults to engage in antisocial behavior of all types, including fighting, joining gangs, driving recklessly or drunk, using illegal drugs, and having unprotected sex.[8] These behaviors

---

[4] *Roper*, 543 U.S. at 569-70 (2005).

[5] *Id.* at 569.

[6] *See, e.g.*, *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988).

[7] *See, e.g.*, Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78, 78 (2008).

[8] Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992); Lawrence B. Finer & Stanley K. Henshaw, *Disparities in*

are particularly acute for adolescents subject to conditions that routinely place them in risky situations and deprive them of positive role models, such as extreme poverty, poor schools, and violent communities.[9] Psychologists and social scientists have documented and examined these factors in numerous empirical studies.[10]

B. Adolescents Take More Risks in Part Due to Differences in Neurological Development.

In recent years, science has identified a biological basis for these common-sense and empirical observations of adolescent decisionmaking and behavior. Research is making it increasingly clear that adolescence is a time of great structural change in the composition and workings of the brain. These studies — including studies relied upon in *Roper* and

---

Rates of Unintended Pregnancy in the United States, 1994 and 2001, 38 PERSP. ON SEXUAL REPROD. HEALTH 90 (2006); Eve K. Moscicki, *Epidemiology of Completed and Attempted Suicide: Toward a Framework for Prevention*, 1 CLINICAL NEUROSCI. RES. 310 (2001); Alex R. Piquero et al., *The Criminal Career Paradigm*, 30 CRIME & JUST. 359 (2003); NATIONAL RESEARCH COUNCIL, INSTITUTE OF MED. & TRANSPORTATION RESEARCH BD., PREVENTING TEEN MOTOR CRASHES: CONTRIBUTIONS FROM BEHAVIORAL AND SOCIAL SCIENCE, WORKSHOP REPORT (2007), *available at* http://www.nap.edu/catalog/11814.html.

[9] Michelle Fine & Jessica Ruglis, *Circuits and Consequences of Dispossession: The Racialized Realignment of the Public Sphere for U.S. Youth*, 17 TRANSFORMING ANTHROPOLOGY 20, 30 (2009).

[10] *See, e.g.*, Robert W. Blum et al., *The Effects of Race/Ethnicity, Income, and Family Structure on Adolescent Risk Behaviors*, 90 AM. J. PUB. HEALTH 1879 (2000); Robert J. Sampson & John H. Laub, *Urban Poverty and the Family Context of Delinquency: A New Look at Structure and Process in a Classic Study*, 65 CHILD DEV. 525 (1994); Patrick H. Tolan et al., *The Developmental Ecology of Urban Males Youth Violence*, 39 DEVELOPMENTAL PSYCHOL. 274 (2003).

studies completed since — provide one explanation for the differences in adolescent behavior that psychologists and social scientists have long documented through empirical work.

This explanation is based on the trajectory of brain development. During the early teen years, the brain undergoes at least five principal growth processes. The *first* is "arborization," a process by which connections between brain cells branch and increase in number as the brain grows more gray matter.[11] *Second*, from the early teens through early adulthood, the brain undergoes "neural pruning," a process by which the brain fine-tunes connections between neurons. Connections that are used most often — which can vary based on an individual's experience and environment — grow stronger, while those that are unused disappear.[12] As unnecessary connections are eliminated, the brain becomes more efficient in carrying information.[13]

The *third* process is myelination, whereby nerve pathways are insulated to increase the speed at

---

[11] *See* Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 ANNALS N.Y. ACAD. SCI. 77, 82 (2004).

[12] Linda P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCI. & BIOBEHAV. REVIEWS, 417, 439 (2000).

[13] Sarah-Jayne Blakemore & Suparna Choudhury, *Development of The Adolescent Brain: Implications for Executive Function and Social Cognition*, 47 J. CHILD PSYCHOL. & PSYCHIATRY 296, 297 (2006); B.J. Casey et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 66-67 (2008); Deanna Kuhn, *Do Cognitive Changes Accompany Developments in the Adolescent Brain?*, 1 PERSP. PSYCHOL. SCI. 59, 59, 65 (2006).

which signals are conducted through them.[14] *Fourth*, a rapid increase followed by a gradual decrease of dopamine receptors occurs in the prefrontal cortex.[15] Dopamine plays a critical role in heightening the brain's sensitivity to rewards, and dopaminergic activity is at its peak during the ages of twelve through eighteen. *Finally*, neural connections between the cortical and subcortical regions increase during later adolescence, which allows the area of the brain providing psychosocial control to begin to govern the area that generates emotional responses.[16]

Research shows that the primitive areas of the brain that produce emotions are the first to mature, while areas of the brain involved in higher-level control functions develop later.[17] Post-mortem histological studies have long suggested that the frontal lobes continue to develop through pruning and myelination from early adolescence through a person's early twenties.[18] More recently, tests using magnetic resonance imaging ("MRI") technology have confirmed that the frontal lobes — in particular, the prefrontal cortex, or the anterior part of the frontal lobes, which are responsible for "executive functions" such as self-control, judgment, emotional regulation,

---

[14] Heather M. Conklin et al., *Working Memory Performance in Typically Developing Children and Adolescents: Behavioral Evidence of Protracted Frontal Lobe Development*, 31 DEVELOPMENTAL NEUROPSYCHOL. 103, 104 (2007).

[15] Spear, *supra* note 12, at 440, 443.

[16] Casey et al., *supra* note 13, at 67; Thomas J. Eluvathingal, *Quantitative Diffusion Tensor Tractography of Association and Projection Fibers in Normally Developing Children and Adolescents*, 17 CEREBRAL CORTEX 2760 (2007).

[17] Casey et al., *supra* note 13, at 66.

[18] Conklin et al., *supra* note 14, at 104.

organization, and planning — are among the last regions of the brain to mature.[19] Neurological research conducted through recent advances in MRI testing suggests that even as adolescents' brains mature in other areas, adolescents still do not reason in the same manner as adults because they lack fully formed frontal lobes.[20]

Studies also suggest that the immature controls associated with underdeveloped frontal lobes are at least partly responsible for higher rates of risk-taking among adolescents. Indeed, studies confirm that adolescents use different areas of the brain to complete tasks that, in adults, would normally be completed by the frontal lobes.[21] For example, the better-developed limbic system, which is the emotional center of the brain, has been observed to "stand in" for adolescents' immature control functions, meaning that the adolescent may process emotionally what the adult processes through logic and reason.[22]

---

[19] Casey et al., *supra* note 13, at 66; Conklin et al., *supra* note 14, at 104-105.

[20] *See* Casey et al., *supra* note 13, at 66; Jay N. Giedd, *The Teen Brain: Insights from Neuroimaging*, 42 J. ADOLESCENT HEALTH 335, 340 (2008); Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174, 8177 (May 25, 2004), *available at* www.pnas.org_cgi_doi_10.1073_pnas.0402680101.

[21] *See* Mary Beckman, *Crime, Culpability, and the Adolescent Brain*, 305 SCIENCE 596, 599 (2004).

[22] Coalition for Juvenile Justice, *Applying Research to Practice: What Are the Implications of Adolescent Brain Development for Juvenile Justice* 6-7 (May 5, 2006), *available at* http://www.juvjustice.org/media/resources/resource_138.pdf; *see also* Casey et al., *supra* note 13, at 63-64.

One MRI study published in June 2006 demonstrates how emotional centers of the brain can overbalance the caution and forethought exerted by the frontal areas in adolescents. Subjects were asked to respond quickly to cues in a video game in order to earn rewards of various amounts. Scientists captured MRI images showing which areas of the brain were most active during the task. The study found that adolescents showed child-like levels of activity in the areas of the brain that control decisionmaking (the orbital frontal cortex), but more adult-like levels of activity in the better-developed accumbens, an impulse-producing region of the brain. As the rewards in the game grew, the activity levels in the accumbens of adolescents' brains also increased dramatically. This study demonstrates the biological nature of adolescents' exaggerated preferences for rewards.[23] Other studies have shown similar results.[24]

Adolescents' impulsiveness also results from an innate under-appreciation of cost and overvaluation of short-term rewards, which together

---

[23] Adriana Galvan et al., *Earlier Development of the Accumbens Relative to Orbitofrontal Cortex Might Underlie Risk-Taking Behavior in Adolescents*, 26 J. NEUROSCI. 6885 (2006).

[24] *See, e.g.*, James M. Bjork et al., *Developmental Differences in Posterior Mesofrontal Cortex Recruitment by Risky Rewards*, 27 J. NEUROSCI. 4839 (2007); Neir Eshel et al., *Neural Substrates of Choice Selection in Adults and Adolescents: Development of the Ventrolateral Prefrontal and Anterior Cingulate Cortices*, 45 NEUROPSYCHOLOGIA 1270 (2007); Adriana Galvan et al., *Risk-Taking and the Adolescent Brain: Who Is at Risk?*, 10 DEVELOPMENTAL SCI. F-8 (2007); Scott C. Matthews et al., *Selective Activation of the Nucleus Accumbens During Risk-Taking Decision Making*, 15 NEUROREPORT 2123 (2004).

create a heightened preference for risk.[25] Research conducted under controlled conditions has attempted to parse the bases for this decisionmaking, and shows that adolescents systematically overvalue immediate rewards while undervaluing both future rewards and future costs. In a series of studies published in 2004 and 2005, subjects were asked to choose playing cards from "bad" decks, which include the potential for very large one-time rewards but generally lead to net losses over time, or "good" decks, which offer smaller one-time rewards but lead to net gains over time (known as the "Iowa Gambling Task"). Adults learned to choose the good decks and avoid the bad decks more quickly than their thirteen- through fifteen-year-old counterparts, demonstrating a superior ability to learn from experience, reduced preference for immediate reward, and higher aversion to punishment.[26] Another gambling task study, currently in press, shows that the period between ages fifteen and seventeen is exceedingly important for the development of decisionmaking abilities. The study shows that immediate "reward sensitivity," or preference for the good decks, peaks

---

[25] Laurence Steinberg, *Risk Taking in Adolescence: What Changes and Why?*, 1021 ANNALS N.Y. ACAD. SCI. 51, 54 (2004); *see also* Stephanie M. Holm et al., *Reward-Related Brain Function and Sleep in Pre/Early Pubertal and Mid/Late Pubertal Adolescents*, J. ADOLESCENT HEALTH (forthcoming 2009).

[26] Eveline A. Crone & Maurits W. van der Molen, *Developmental Changes in Real Life Decision Making: Performance on a Gambling Task Previously Shown to Depend on the Ventromedial Prefrontal Cortex*, 25 DEVELOPMENTAL NEUROPSYCHOL. 251 (2004).

during adolescence, while avoidance of the bad decks develops more slowly — linearly with age.[27]

A study published in 2009 provides further confirmation of adolescents' elevated perception of the benefits of future rewards.[28] The study found the starkest differences in ability between adolescents and young adults, including with respect to self-reported likelihood of planning ahead and consideration of the future, self-reported inclination to anticipate the future consequences of today's actions, and demonstrable preferences for immediate rewards. For example, compared to young adults, adolescents tended to choose smaller immediate rewards (*e.g.*, $600 tomorrow) even when offered much larger delayed rewards (*e.g.*, $1000 one year later).[29] These results confirm that the adolescents' consideration of the future import of their actions differs from that of adults, and is likely to change over time.

Another factor leading to impulsiveness and poor decisionmaking in adolescents is the elevated

---

[27] Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, DEVELOPMENTAL PSYCHOL. (forthcoming 2009); *see also* Catalina J Hooper et al., *Adolescents' Performance on the Iowa Gambling Task: Implications for the Development of Decision Making and Ventromedial Prefontal Cortex*, 40 DEVELOPMENTAL PSYCHOL. 1148 (2004); Katya Rubia et al., *Progressive Increase of Frontostriatal Brain Activation from Childhood to Adulthood During Event-Related Tasks of Cognitive Control*, 27 HUM. BRAIN MAPPING 973 (2006).

[28] Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 459, 470 (2009) (citing Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28 (2009)).

[29] *Id.*

impact of stress. Stress causes the release of high levels of dopamine in adolescent brains, which further impairs the already-underdeveloped prefrontal cortical regulation of behavior and thought.[30] High levels of dopamine combined with immature prefrontal activity may lead to insufficient control over the reward-processing regions of the brain. Accordingly, compared to adults, adolescents experience dramatic loss of judgment during emotional or stressful situations.[31]

The cumulative result of these normal developments in adolescents is a period of vulnerability during the ages of twelve to eighteen, when adolescents have an enhanced biological propensity to value immediate sensory rewards at the cost of long-term consequences, but have not developed the brain connections to regulate impulses and make more well-reasoned decisions. Adolescent brains differ from adult brains in this fundamental respect, particularly with respect to the areas governing judgment and decisionmaking.

It has been said that the very part of the brain that is judged by the legal process — the frontal lobes — develops last, and may not be fully mature until long after the offense has been committed, reducing culpability.[32] Moreover, as a result of their

---

[30] Amy F. T. Arnsten & Rebecca M. Shansky, *Adolescence: Vulnerable Period for Stress-Induced Prefrontal Cortical Functioning?*, 1021 ANNALS N.Y. ACAD. SCI. 143, 144 (2004); Coalition for Juvenile Justice, *Applying Research to Practice: What Are the Implications of Adolescent Brain Development for Juvenile Justice* 5-6 (May 5, 2006), http://www.juvjustice.org/media/resources/resource_138.pdf.

[31] Casey et al., *supra* note 13, at 64.

[32] *See* Mary Beckman, *supra* note 21, at 596.

impulsiveness and lack of cognitive function, adolescents are comparatively immune to the deterrent effects of severe sentences.[33] As the adolescent matures, however, his or her decisionmaking ability likely will improve, such that the same individual will make different and better decisions as an adult.

II. THE ADOLESCENT BRAIN IS PLASTIC, RENDERING ADOLESCENTS HIGHLY SUSCEPTIBLE TO OUTSIDE INFLUENCES (INCLUDING PEER PRESSURE AND ENVIRONMENTAL STRESSES) YET CAPABLE OF ENORMOUS CHANGE THROUGH REHABILITATION.

A. Adolescents Are Unusually Susceptible to Peer Influence.

No one reasonably disputes that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," than adults.[34] Anyone familiar with young people knows that susceptibility to peer pressure is particularly high in late childhood and early adolescence. In confirmation of this point, laboratory experiments show that the presence of peers doubles the risky behavioral decisions of middle adolescents but has no effect on adults.[35]

---

[33] Eric L. Jensen, *The Waiver of Juveniles to Criminal Court: Policy Goals, Empirical Realities, and Suggestions for Change*, 31 IDAHO L. REV. 173, 186-87 (1994-95) (citing Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 CRIME & DELINQUENCY 96, 100-102 (1994)).

[34] *Roper*, 543 U.S. at 569.

[35] Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking*, 41 DEVELOPMENTAL PSYCHOL. 625 (2005).

Ironically, heightened sensitivity to the influence of peers also is a necessary part of adolescents' normal development into functional adults.[36] Identity formation involves a series of trials and errors in which adolescents gauge reactions from others to select and integrate elements of their personality into a realized self.[37] Formation of the adult brain requires this experimentation and risk-taking,[38] and adolescents' desire for peer approval (or fear of rejection) can affect their decisions even without direct coercion by peers.[39] The ability to resist peer influence develops over time, particularly during the ages of fourteen through eighteen.[40]

Susceptibility to peer pressure may in the wrong circumstances translate into susceptibility to committing crimes. It is well-established that adolescents tend to commit crimes in group settings, because group settings provide strong incentives for conformity and compliance.

The nature and extent of peer influence on adolescent criminal behavior has been documented through rigorous science, including laboratory experiments, field observations, clinical

---

[36] Ann E. Kelley et al., *Risk Taking and Novelty Seeking in Adolescence*, 1021 ANNALS N.Y. ACAD. SCI. 27, 28 (2004).

[37] ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 51 (2008).

[38] Kelley et al., *supra* note 36, at 28.

[39] Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1012 (2003).

[40] Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCHOL. 1531, 1538-39 (2007).

interventions, and brain-imaging studies.[41] In one experiment, deviant adolescents were randomly placed into a group setting with either all deviant peers or mixed deviant and non-deviant peers. The adolescents placed with all deviant peers displayed more deviant behaviors, demonstrating peer influence.[42] In a field study, exposure to delinquent peers was found to result in increased criminal behavior by adolescents over time, independent of any self-selection into deviant peer groups, further demonstrating the influence of peers.[43] Indeed, numerous studies have shown that adolescent criminal behavior increases after entry into peer gangs and declines after exit from these gangs.[44] Two recent comprehensive reviews of the literature concluded that peer influence effects on serious antisocial behavior are robust and strongest among young adolescents who are in the presence of slightly older, slightly more deviant peers.[45] In short,

---

[41] *See generally* DEVIANT PEER INFLUENCES IN PROGRAMS FOR YOUTH (Kenneth A. Dodge, Thomas J. Dishion & Jennifer E. Lansford eds., 2006); Philip Cook et al., *The Negative Impact of Starting Middle School in Sixth Grade*, 27 J. POL'Y ANALYSIS & MGMT. 104 (2008); Marie-Helene Grosbras et al., *Neural Mechanisms of Resistance to Peer Influence in Early Adolescence*, 27 J. NEUROSCI. 8040, 8040 (2007).

[42] RONALD A. FELDMAN ET AL., THE ST. LOUIS CONUNDRUM: THE EFFECTIVE TREATMENT OF ANTISOCIAL YOUTHS (1983).

[43] Kristan Glasgow Erickson et al., *A Social Process Model of Adolescent Deviance: Combining Social Control and Differential Association Perspectives*, 29 JOURNAL OF YOUTH AND ADOLESCENCE 395, 420-21 (2000).

[44] Terence P. Thornberry et al., *The Role of Juvenile Gangs in Facilitating Delinquent Behavior*, 30 J. RES. CRIME & DELINQUENCY 55, 80 (1993).

[45] DEVIANT PEER INFLUENCES IN PROGRAMS FOR YOUTH, *supra* n. 41, at 367; UNDERSTANDING PEER INFLUENCE IN CHILDREN AND

adolescents exhibit a predisposition to follow peer influence that is profound, that is reversible, and that adults simply do not share.

B. Adolescents Are Highly Influenced by — and Live at the Mercy of — Psychosocial Conditions, Socioeconomic Variables, and Other Environmental Factors.

Children's brains adapt to children's environments. Beginning when a child is still in the womb, the brain organizes itself so that neurons and neural systems change in a "use-dependent" way.[46] Brain cells connect to each other via synapses, and synapses grow and become stronger when they are used. If an environment or set of experiences is frequent, the same synapses repeatedly are used and strengthened. This strengthening process is crucial for building memory and skill.

The moldability of brain connections through external experience is termed "plasticity." As a result of plasticity, the more often an individual is exposed to threatening environments — including difficult home and neighborhood environments — the more quickly the brain learns to respond to those threats.[47] Frequent exposure to threatening or

---

ADOLESCENTS 9 (Mitchell J. Prinstein & Kenneth A. Dodge eds., 2008).

[46] Bruce D. Perry, Inaugural Lecture at the Margaret McCain Lecture Series: Maltreatment and the Developing Child: How Early Childhood Experience Shapes Child and Culture, (Sept. 23, 2005), *available at* http://www.lfcc.on.ca/mccain/perry.pdf.

[47] *See* R.M. Post, *Transduction of Psychosocial Stress into the Neurobiology of Recurrent Affective Disorder*, 149 AM. J. PSYCHIATRY 999, 1004-05 (1992); *see also* DEBRA NIEHOFF, THE BIOLOGY OF VIOLENCE: HOW UNDERSTANDING THE BRAIN,

violent environments strains the adolescent's immature prefrontal lobe, and this strain further impairs an adolescent's ability to control his or her own impulses.[48]

More than 100 studies have demonstrated that early exposure to threatening or traumatic environments leads a young person to develop hypervigilance in responding to certain threat cues.[49] This type of upbringing also instills a biased readiness to attribute hostile intent to other persons. A child whose brain has adapted to an environment of chaos will continue in a physiological state of alarm even when the environment has stabilized and the threat is not immediately present.[50] Although these adaptive responses are designed to help the child cope in a threatening environment, they also lead to growth in violent behavior.[51] Traumatized children may simply have less capacity to respond appropriately to the everyday demands and stresses of life.[52] Indeed, childhood abuse or neglect has been shown to increase the likelihood of arrest as a

---

BEHAVIOR, AND ENVIRONMENT CAN BREAK THE VICIOUS CIRCLE OF AGGRESSION 182-87 (1999).

[48] Jane Rutherford, *Community Accountability for the Effect of Child Abuse on Juvenile Delinquency in the Brave New World of Behavioral Genetics*, 56 DEPAUL L. REV. 949, 953 (2007).

[49] *See* Kenneth A. Dodge, *Translational Science in Action: Hostile Attributional Style and the Development of Aggressive Behavior Problems*, 18 DEV. & PSYCHOPATHOLOGY 791, 792, 807 (2006).

[50] *See* Perry, *supra* note 46.

[51] *See* Kenneth A. Dodge, *supra* note 49.

[52] *See* Kenneth A. Dodge et al., *Aggression and Antisocial Behavior in Youth*, *in* 3 HANDBOOK OF CHILD PSYCHOLOGY: SOCIAL, EMOTIONAL, AND PERSONALITY DEVELOPMENT 719, 757 (6th ed., 2006) [hereinafter Dodge et al., HANDBOOK].

juvenile by 59%. Abuse also correlates with a younger age of first arrest.[53]

Studies also indicate that criminal behavior in adolescents correlates with socioeconomic conditions, which are outside the control of the adolescent and subject to change. Research consistently shows that neighborhoods with high rates of juvenile offenders tend to be characterized by poverty, population heterogeneity, and family disruption.[54] One 2005 study indicated that: (1) family poverty, measured by welfare receipt, is positively related to juvenile's involvement in robbery, burglary and theft; (2) county poverty, measured by per capita welfare spending, is positively related to the likelihood of selling drugs, assault, and robbery; and (3) lack of employment opportunities, as measured by the county employment rate, is correlated with the selling of drugs and robbery.[55]

Poverty also exacerbates adolescents' susceptibility to peer influence. Adolescents who live in high-crime neighborhoods may find that the pressures to join in criminal activity are overwhelming, and a young person may feel that participation in criminal activity is necessary to avoid

---

[53] Cathy S. Widom & Michael G. Maxfield, *An Update on the "Cycle of Violence"*, NAT'L INST. JUST. RES. BRIEF, Feb. 2001. Conversely, greater attachment to family and school reduces the prevalence, intensity, and frequency of deviant behavior. Sanford M. Dornbusch et al., *The Relation of Family and School Attachment to Adolescent Deviance in Diverse Groups and Communities*, 16 J. ADOLESCENT RES. 396, 416 (2001).

[54] *See, e.g.*, ROBERT JOSEPH BURSIK, JR. & HAROLD G. GRASMICK, NEIGHBORHOODS AND CRIME 25-26, 50, 82 (1993).

[55] H. Naci Mocan & Daniel I. Rees, *Economic Conditions, Deterrence and Juvenile Crime: Evidence from Micro Data*, 7 AM. L. ECON. REV. 319, 341 (2005).

threats to his or her own safety.[56] Indeed, studies demonstrate that adolescents with less education or from socioeconomically disadvantaged backgrounds score lower in tests of future orientation than juveniles from more privileged backgrounds.[57]

Aggressive survival responses, antisocial conditions, and deprived backgrounds may or may not manifest as criminal behavior, and it is important to note that juveniles' responses to these stresses develop throughout adolescence. Indeed, adolescents are capable of reversing or outgrowing these effects if discipline and socialization are introduced.[58] The same brain plasticity that renders an adolescent susceptible to these stressors makes them capable of rehabilitation and reform.

C. Rehabilitation in Adolescents Is Highly Effective.

The Court recognized in *Roper* the simple truth that the "signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside."[59] Research confirms that risky or

---

[56] Jeffrey Fagan, *Atkins, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment*, 33 N.M. L. REV. 207, 241 (2003).

[57] Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 29 (2009) (citing Jari-Erik Nurmi, *Age, Sex, Social Class, and Quality of Family Interaction as Determinants of Adolescents' Future Orientation: A Developmental Task Interpretation*, 22 ADOLESCENCE 977 (1987)).

[58] *See* Cathy Spatz Widom, *The Cycle of Violence*, 244 SCIENCE 4901 (1989); *see also* John Paul Wright & Francis T. Cullen, *Parental Efficacy and Delinquent Behavior: Do Control and Support Matter?*, 39 CRIMINOLOGY 677 (2001).

[59] *Roper*, 543 U.S. at 570.

antisocial behavior in adolescence is fleeting. Only a small proportion of adolescents who engage in illegal activities continues to commit offenses as adults.[60] As noted above, neurological studies show that adolescent brains are still learning, developing, and creating new connections, which in turn suggests that juveniles are likely to be more responsive than adults to rehabilitation. In short, "it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."[61]

The potential for rehabilitation exists even for the most difficult adolescents. For example, despite the detrimental effects of early childhood neglect or trauma, evidence indicates that a child's brain can be repaired by repetitive exposure to developmentally-appropriate experiences. Studies have shown that repeated exposure to positive developmental experiences will influence precisely those parts of the brain that were altered by the neglect or other trauma the child faced.[62] Adolescents change rapidly — in response to both trauma and rehabilitation. Longitudinal empirical studies confirm that a sizable percentage of antisocial early adolescents stop their antisocial behavior by adulthood, as a result of structured intervention or

---

[60] *See* Steinberg & Scott, *supra* note 39, at 1014; *see also* Scott & Steinberg, *supra* note 37, at 52-53 (citing U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATION IN THE UNITED STATES, 1995 (1997)).

[61] *Roper*, 543 U.S. at 570.

[62] *See* Perry, *supra* note 46.

natural life events such as starting a family or joining the workforce.[63]

Treatment of Conduct Disorder serves as an example. Conduct Disorder, a high-risk psychiatric condition in which a child repeatedly violates basic social rules and which was once believed to be impervious to treatment, has been proven treatable through intervention programs.[64] Numerous intervention studies show that even the highest-risk youths can be treated effectively, resulting in a reduced likelihood that they will engage in violence in the future.[65] A panel of eminent scientists and practitioners assembled in 2003 by the National Institute of Health to review the state of the science concluded that intervention programs are effective in preventing serious violence, even in highest-risk youths.[66] The President's New Freedom Commission on Mental Health came to a similar conclusion in 2003.[67] The United States Surgeon General has

---

[63] Robert J. Sampson & John H. Laub, *A Life-Course View of the Development of Crime*, 602 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 17-18 (2005).

[64] Paul J. Frick, *Effective Interventions for Children and Adolescents With Conduct Disorder*, 46 CANADIAN J. PSYCHIATRY 597, 605 (2001).

[65] *See* Dodge et al., HANDBOOK, *supra* note 52, 765-69; CONDUCT PROBLEMS PREVENTION RESEARCH GROUP, *Fast Track Randomized Controlled Trial to Prevent Externalizing Psychiatric Disorders: Findings From Grades 3 to 9*, 46 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1250-1262 (2007).

[66] Linda S. Chan et al., Evidence Report/Technology Assessment No. 107, *Preventing Violence and Related Health-Risking Social Behaviors in Adolescents* (Oct. 2004).

[67] *See* PRESIDENT'S NEW FREEDOM COMM'N ON MENTAL HEALTH, ACHIEVING THE PROMISE: TRANSFORMING MENTAL HEALTH CARE IN AMERICA (2003).

reached the same conclusion.[68] Because even the most difficult conditions may be treatable in adolescents, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[69]

III. ADOLESCENTS ARE FAR LESS CAPABLE THAN ADULTS TO AID IN THEIR DEFENSE BEFORE AND DURING TRIAL.

The Court may reasonably inquire whether the legal system can account for the unique characteristics of adolescents during trial and sentencing. It cannot. For the reasons stated above, no one — not professional psychiatrists, and certainly not the judicial system — can reliably identify those few (if any) adolescents for whom hope can or should be abandoned at an early age.

Adolescents are at a particular disadvantage in a legal process designed for adults. To be sure, many of these cases involve adolescents who are "competent" within the legal understanding of the term. Nonetheless, fairness requires that defendants be able to participate effectively in the proceedings against them, which requires an understanding of the nature of the proceedings, an ability to consult with counsel, and the ability to assist in preparing their defense.[70]

---

[68] U.S. PUB. HEALTH SERV., YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL (2001).

[69] *Roper*, 543 U.S. at 573.

[70] *Drope v. Missouri*, 420 U.S. 162, 171 (1975); *Dusky v. United States*, 362 U.S. 402 (1960).

Even competent adolescents lag behind adults in each of these areas of legal and functional capability. Accordingly, *Amici* respectfully submit that the Court should take great pause before assuming that the legal system — which depends greatly upon the participation of the accused — will fairly and accurately identify only those thirteen- to seventeen-year-olds who are most deserving of the most severe punishment.

First, adolescents are far less able than adults to understand the nature of the legal proceedings against them — including the charges pending, the costs and benefits of available pleas, the roles of key courtroom figures, the import of potential penalties, and the rights that are constitutionally guaranteed to them.[71] Even "[t]he most informal and well-intentioned of judicial proceedings" — which criminal prosecutions are not — "are technical; few adults without legal training can influence or even understand them; certainly children cannot."[72]

Studies show that adolescents are at great risk of failing to comprehend fundamental aspects of the justice system, and adolescents from disadvantaged backgrounds are at particular risk. For example, one study found that only 28% of sixteen- to eighteen-year-old students living in areas with low rates of income and education understood that the right to remain silent protects them from being ordered to

---

[71] *See* THOMAS GRISSO & ROBERT G. SCHWARTZ, YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 163, 147, 158 (2000).

[72] *In re Gault*, 387 U.S. 1, 38 n.65 (1967) (quoting REPORT OF THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 86-87 (1967)).

speak in a courtroom. By comparison, 52% of students from middle-income backgrounds understood this fact. The low-income students also were comparatively less likely to understand the significance of a confession or the right to be represented by counsel.[73]

Second, adolescents are far less able than adults to assist their own counsel. The Court has long recognized that an adolescent has special needs in the legal process and requires the "guiding hand of counsel at every step of the proceedings against him."[74] However, adolescents' immaturities affect their ability to communicate meaningfully with their counsel, to provide counsel with information relevant to a defense, and to preserve the attorney-client relationship.[75] Adolescents lack adult levels of concentration, which impedes their ability to provide information regarding events relevant to the crime.[76] Adolescents' lack of life experience can prevent them from recognizing exculpatory facts. Adolescent offenders also suffer from psychological disorders at alarming rates, which generally go without treatment.[77] These deficiencies are only exacerbated

---

[73] Shavaun M. Wall & Mary Furlong, *Comprehension of Miranda Rights by Urban Adolescents with Law-Related Education*, 56 PSYCHOL. REP. 359, 366-68 (1985).

[74] *In re Gault*, 387 U.S. at 36 (quoting *Powell v. Alabama*, 287 U.S. 45, 68 (1932)).

[75] Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 459, 475 (2009).

[76] Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 819 (2005).

[77] *See* Laurence Steinberg et al., *Reentry of Young Offenders from the Justice System: A Developmental Perspective*, 2 YOUTH VIOLENCE & JUVENILE JUST. 21, 30 (2004).

in situations of deep deprivation or poverty. Indeed, one 2007 study showed that living in a deeply impoverished neighborhood reduces the verbal ability of children by a magnitude equivalent to one missed year of school.[78]

Due to age and inexperience, adolescents may fundamentally misapprehend their attorney's role. Effective trial participation requires "a personally relevant understanding of the lawyer's advocacy role and the confidential nature of the attorney-client relationship, as well as comprehension of one's own directive role in the process."[79] Adolescent defendants often lack this understanding — for example, they may be prone to question an attorney's allegiance and withhold relevant information out of fear that such information will be used against them.[80] One study showed that while 96% of juveniles reported that they believed attorney-client confidentiality prevented their attorney from disclosing their conversations, 26% of those participants also believed that a lawyer could disclose any information to the judge and 30% believed that the lawyer could tell their parents what they had said.[81] Another study found that one-in-three to one-

---

[78] Robert J. Sampson et al., *Durable Effects of Concentrated Disadvantage on Verbal Ability Among African-American Children*, 105 PROC. NAT'L ACAD. SCI. 845 (2008).

[79] Melinda G. Schmidt et al., *Effectiveness of Participation as a Defendant: The Attorney-Juvenile Client Relationship*, 21 BEHAV. SCI. & L. 175, 177 (2003) (citing EMILY BUSS, THE ROLE OF LAWYERS IN PROMOTING JUVENILES' COMPETENCE AS DEFENDANTS (R.G. Schwartz ed., 2000)).

[80] *Id.*

[81] Michele Peterson-Badali et al., *Young People's Experience of the Canadian Youth Justice Systems: Interacting with Police and Legal Counsel*, 17 BEHAV. SCI. & L. 455, 461 (1999)

in-four juvenile offenders, as compared to one-in-ten adult offenders, believed that if they told their attorney that they had committed the act in question, then their attorney would not be able to defend them at all.[82]

Third, adolescents are far less capable of making important legal decisions and assisting in their own defense. The four basic dimensions of psychosocial maturity most relevant to decisionmaking are susceptibility to peer pressure, risk perception, future orientation, and impulsivity.[83] As stated, adolescents differ substantially from adults in all four areas. Compared to adults, adolescents attach more value to short-term results than to long-term consequences — positive or negative — when making decisions.[84] Likewise, adolescents are more likely to seek immediate gains, such as curtailing of difficult questioning by over- or under-emphasizing their role in a crime. They are less likely to focus on long-term benefits, such as the advantages that come with plea agreements. Adolescents are even more likely to avoid admitting or communicating difficult facts to their attorneys.[85] These fundamental judgmental deficiencies put adolescents at a severe disadvantage in the formal legal process, significantly undermining the

---

(discussing Canadian youth's understanding of legal concepts similar to those found in U.S. law).

[82] Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1158 (1980).

[83] Steinberg & Scott, *supra* note 39, at 1012.

[84] Schmidt et al., *supra* note 79, at 176, 191; Steinberg & Scott, *supra* note 39, at 1012, 1019.

[85] Schmidt et al., *supra* note 79, at 176, 191.

possibility that individual capabilities or deficiencies will be caught in the ordinary workings of our system.

CONCLUSION

Well-established, growing, and uniform scientific and academic study shows that the purposes of a sentence of life without parole — punishing the culpable, deterring the sensible, and incapacitating the incorrigible — are not reliably or rationally served by the imposition of that sentence upon adolescents. For these reasons, *Amici* respectfully submit that the judgments of the courts below should be reversed.

Respectfully Submitted,

July 23, 2009

STEPHEN M. NICKELSBURG*
SARAH BLACKMAN
CLIFFORD CHANCE US LLP
2001 K Street NW
Washington DC 20006-1001
(202) 912-5000

Counsel for Amici Curiae

***Counsel of Record**

AMICUS CURIAE BRIEF

Nos. 08-7412 & 08-7621

Supreme Court, U.S.
FILED
JUL 23 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRITS OF CERTIORARI TO THE
DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF OF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF JEWISH LAWYERS AND JURISTS, AMERICAN CATHOLIC CORRECTIONAL CHAPLAINS ASSOCIATION, AMERICAN CORRECTIONAL CHAPLAINS

(Continued on inside cover)

MICHAEL B. DE LEEUW
Counsel of Record
JOHNATHAN SMITH
JORDAN BARRY
DALE HO
GRACE DAVIES
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP
One New York Plaza
New York, New York 10004
(212) 859-8000

Attorneys for Amici Curiae

Association, American Friends Service Committee, Buddhist Peace Fellowship, Church Women United, The Council of Churches of the City of New York, Engaged Zen Foundation, The General Synod of the United Church of Christ, Islamic Shura Council of Southern California, Karamah: Muslim Women Lawyers for Human Rights, Mormons for Equality and Social Justice, National Council of the Churches of Christ in the United States of America, National Council of Jewish Women, New Jersey Regional Coalition, Office of Restorative Justice, Archdiocese of Los Angeles, Prison Fellowship Ministries, Progressive Jewish Alliance, Queens Federation of Churches, Rev. Dwight Lundgren, Sister JoAnne Talarico, Trinity United Methodist Church, and United Methodist Church, General Board of Church and Society

In Support of Petitioners

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. The Perspectives of Religious Organizations Are Important to This Court's Interpretation of the Eighth Amendment 3

II. Sentencing Juvenile Offenders to Life Imprisonment Without the Possibility of Parole for Non-Homicide Crimes Disregards the Special Status That Juveniles Are Accorded Due to Their Diminished Capacity 5

A. Christianity, Judaism, Islam, and Buddhism Accord Juveniles Special Treatment on Account of Their Lesser Mental Sophistication, Both Generally and with Respect to Criminal Matters in Particular 6

B. The Distinctions Drawn by Christianity, Judaism, Islam, and Buddhism with Respect to Juveniles Are Supported by Science and

Contents

Page

Mirrored in State and Federal Law, As Well As the Laws of Other Nations 8

C. Sentencing Juveniles to Life Imprisonment Without the Possibility of Parole for Non-Homicide Offenses Constitutes Cruel and Unusual Punishment Because It Disregards the Longstanding Societal Consensus That Juveniles Merit Special Treatment 13

III. Imposing Life Imprisonment Without the Possibility of Parole on Juvenile Offenders Contravenes Fundamental Religious Values 14

A. Imposing Such a Punitive Sentence on Juvenile Offenders Contravenes Religious Teachings That Tell Us That All Individuals, and Particularly Juveniles, Are Deserving of Mercy, Forgiveness, and Compassion 15

B. Sentencing Juvenile Offenders to Life Imprisonment Without the Possibility of Parole Denies Them Their Potential for Rehabilitation and Development 20

Contents

Page

C. The Fundamental Values Espoused by Christianity, Judaism, Islam, and Buddhism Demand That Juvenile Offenders Like Mr. Sullivan and Mr. Graham Be Given the Possibility of Parole 24

CONCLUSION 28

APPENDIX 1a

TABLE OF CITED AUTHORITIES

Page

CASES

Atkins v. Virginia,
536 U.S. 304 (2002) 4

Bellotti v. Baird,
443 U.S. 622 (1979) 10

Eddings v. Oklahoma,
455 U.S. 104 (1982) 10

Kennedy v. Louisiana,
128 S. Ct. 2641 (2008) 14, 24-25

Morrissey v. Brewer,
408 U.S. 471 (1972) 25

Roper v. Simmons,
543 U.S. 551 (2005) ..... *passim*

Solem v. Helm,
463 U.S. 277 (1983) 13

Stanford v. Kentucky,
492 U.S. 361 (1989) 4

Thompson v. Oklahoma,
487 U.S. 815 (1988) 3

Trop v. Dulles,
356 U.S. 86 (1958) 3

Cited Authorities

Page

United States v. LaBonte,
520 U.S. 751 (1997) 25

Weems v. United States,
217 U.S. 349 (1910) 3

STATUTES

Cal. Elec. Code § 2000 (2008) 9

Conn. Gen. Stat. § 14-36 (2009) 9

Del. Code Ann. tit. 21, § 2710 (2009) 9

Fla. Stat. Ann. § 97.041 (2009) 9

Ga. Code Ann. § 38-2-3 (2009) 9

20 Ill. Comp. Stat. Ann. 1805/1 (2009) 9

Ind. Code § 31-11-1-4 (2009) 9

Minn. Stat. § 171.04 (2009) 9

N.C. Gen. Stat. § 18B-302 (2009) 9

N.Y. Mil. Law § 2 (Consol. 2009) 9

Ohio Rev. Code Ann. § 3101.01 (2009) 9

Cited Authorities

Page

25 Pa. Stat. Ann. § 2811 (2008) 9

R.I. Gen. Laws § 3-8-4 (2009) 9

Vt. Stat. Ann. tit. 7, § 658 (2009) 9

Wash. Rev. Code § 26.04.010 (2009) 9

Constitutional Provisions

U.S. Const. amend VIII ..... *passim*

U.S. Const. art. I, §§ 2, 3 9

U.S. Const. art. II, § 1 9

Other Authorities

Barry Krisberg, *Reforming Juvenile Justice*, The American Prospect, Aug. 14, 2005, *available at* http://www.prospect.org/cs/articles?article=reforming_juvenilejustice 26

Barry A. Kosmin & Ariela Keysar, American Religious Identification Survey (2008), http://www.americanreligionsurvey-aris.org/reports/ARIS_Report_2008.pdf 4

Cited Authorities

Page

Brief of Petitioner-Appellant, *Graham v. Florida*, No. 08-7412 (U.S. filed July 16, 2009) 12

Brief of Petitioner-Appellant, *Sullivan v. Florida*, No. 08-7621 (U.S. filed July 16, 2009) 13-14

The Center for Law and Global Justice, University of San Francisco School of Law, Report on Human Rights Violations, *Sentencing Our Children to Die in Prison*, Global Law and Practice (2007) 12, 18

David R. Loy, *Healing Justice: A Buddist Perspective*, in The Spiritual Roots of Restorative Justice (Michael L. Hadley ed., 2001) 3, 24

Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* (Oct. 2005) 8

Jay N. Giedd, et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 Nature Neuroscience (1999) 8

Cited Authorities

Page

Kenneth K. Kwong, et al., *Dynamic Magnetic Resonance Imaging of Human Brain Activity During Primary Sensory Stimulation*, 89 Proceedings of the National Academy of Science (1992), *available at* http://www.hrw.org/sites/default/files/reports/TheBestofTheirLives.pdf 8

Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58(12) American Psychologist (Dec. 2003) 8

Luc Roberts & Tony Peters, *How Restorative Justice Is Able To Transcend the Prison Walls: A Discussion of the "Restorative Detention" Project*, in Restorative Justice in Context: International Practice and Directions 95, 98 (Elmar G.M. Weitekamp & Hans-Jurgen Kerner eds., 2003) 24

MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, Issue Brief 3: *Less Guilty by Reason of Adolescence* (2006), *available at* http://www.adjj.org/content/page.php?cat_id=2&content_id=28 8

Cited Authorities

Page

Martin Sicker, *The Political Culture of Judaism* (2001) 19

Michael L. Hadley, *Introduction: Multifaith Reflection on Criminal Justice*, in The Spiritual Roots of Restorative Justice (Michael L. Hadley ed., 2001) 23

Mohamed S. El Awa, *Punishment in Islamic Law* (Indianapolis: American Trust Publications, 1982) 22, 23

Paolo Annino, et al., Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation (2009), *available at* http://www.law.fsu.edu/faculty/profiles/annino/Report_JuvenileLifeSentence.pdf 26

The Right Model for Juvenile Justice, N.Y. Times, Editorial, Oct. 28, 2007, *available at* http://www.nytimes.com/2007/10/28/opinion/28sun2.html 26

Cited Authorities

Page

INTERNATIONAL MATERIALS

Armed Forces Act, 2006, c. 52, § 328, *available at* http://www.opsi,gov.uk/acts/acts 2006/pdf/ukpga_20060052_en.pdf 11

Austl. Cap. Terr. Consolidated Acts, Liquor Act 1975, Part 10, Division 10.2, § 151-58, *available at* http://www.austlii.edu.au/au/legis/act/consol_act/la1975107/ 11

G.A. Res. 40/33, U.N. GAOR, 40th Sess., U.N. Doc. A/RES/40/33 (1985) (1985 Beijing Rules) 11

Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., art. 37(c), U.N. Doc. A/RES/44/25 (1989; entry into force Sept. 2, 1990) 11-12

G.A. Res. 45/112, U.N. GAOR, 45th Sess., Supp. No. 49A, U.N. Doc. A/45/RES/112 (1990) (1990 Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)) 11

G.A. Res. 45/113, U.N. GAOR, 45th Sess., 68th plen. mtg, U.N. A/RES/45/113 (1990) (1990 U.N. Rules for the Protection of Juveniles Deprived of Their Liberty) 11

G.A. Res. 61/146, ¶ 31, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/146 (2007) 12

Cited Authorities

Page

THEOLOGICAL MATERIALS

'Abd al Ghafar Sulayman al-Bandari (ed.) Sunan al-Nasa'i al-Kubra li Ahmad ibn Shu'ayb al-Nasa'i (Beirut: Dar al-Kutub al-'Ilmiya, 9th century reprint 1991) 7

Aèvaghoùa, *The Buddha-Carita, or The Life of Buddha*, Book IX: 17 (Edward B. Cowell, ed. & trans., New Delhi 1977) 17

Al-Fiqh al-Islami wa Adillatuh (Islamic Jurisprudence and its Proofs) (11 volumes) (Damascus: Dar al-Fikr al-Mu'asser, 1997) .. 6, 20

Al-Mawsu'ah al-Fiqhiyyah (Kuwait: Ministry of Awqaf [Religious Endowments], 1995) 7

Babylonian Talmud ..... *passim*

Bible ..... *passim*

Ethics of the Fathers 17

Letter 133 from Saint Augustine to Marcellinus (A.D. 412), in 1 Nicene and Post-Nicene Fathers, First Series, Vol. 1 (J.G. Cunningham trans., Philip Schaff ed., 1887), *available at* http://www.newadvent.org/fathers/1102133.htm (revised & edited for New Advent by Kevin Knight) 20

Cited Authorities

Page

Maimonides, *Yad Hachazakah* 17

Majhima Nikaya 23

Qur'an ..... *passim*

Theragatha 23

INTEREST OF AMICI CURIAE

A coalition of Christian, Jewish, Muslim, and Buddhist religious organizations and individuals join here as amici curiae on behalf of Petitioners Joe Harris Sullivan and Terrance Jamar Graham.[1] Amici's faith traditions, while varied and diverse, all agree that it is morally unjustifiable to sentence juveniles convicted of non-homicide offenses to life imprisonment without the possibility of parole. The imposition of such a harsh punishment on youth contravenes contemporary standards of decency and, as such, violates the Eighth Amendment's guarantee against cruel and unusual punishment.

Individual statements of interest are provided in the Appendix to the Brief.

SUMMARY OF ARGUMENT

Amici, despite the highly nuanced and well-publicized differences in theology and moral outlook within and among Christianity, Judaism, Islam, and Buddhism, unite to object to the imposition of life imprisonment without the possibility of parole on juveniles convicted of non-homicide offenses. First, amici's faith traditions, secular law generally, and contemporary American society all accord juveniles

---

[1] Counsel of record for all parties received notice of amici curiae's intention to file this brief. Letters of consent by the parties to the filing of this briefing have been lodged with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

special treatment because of their unique status. Juveniles are still developing and maturing; they do not grasp the full consequences of their actions, and therefore are less morally culpable for their conduct and less susceptible to deterrents. Sentencing a juvenile to die in prison callously disregards this special status and diminished capacity. Second, amici's fundamental religious texts teach that all individuals are deserving of mercy, forgiveness, and compassion. This is particularly true of members of vulnerable populations, such as children. Imposing such a punitive sentence on youth—especially those who, like Mr. Sullivan, committed non-homicide offenses when they were only thirteen years old—is to act without regard to any such considerations. Finally, life imprisonment without the possibility of parole is a sentence that conflicts with the concept of restorative justice, which is embraced by all of amici's faith traditions, because it denies juvenile offenders the possibility of meaningfully rehabilitating and redemption.

Juvenile offenders should not be rendered immune from punishment. However, amici cannot endorse subjecting youth who commit non-homicide offenses to the permanent condemnation of a sentence of life imprisonment without the possibility of parole. Such an overly harsh punishment cannot be reconciled with the fundamental values espoused by amici's religious traditions and is contrary to contemporary standards of decency. Accordingly, it violates the Eighth Amendment's prohibition against cruel and unusual punishment.

ARGUMENT

I. The Perspectives of Religious Organizations Are Important to This Court's Interpretation of the Eighth Amendment

The Eighth Amendment's prohibition against cruel and unusual punishment is not a static doctrine "fastened to the obsolete," *Thompson v. Oklahoma*, 487 U.S. 815, 821 (U.S. 1988) (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)), but should be interpreted according to "the evolving standards of decency that mark the progress of a maturing society." *Roper v. Simmons*, 543 U.S. 551, 561 (U.S. 2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality)).

The importance of a society's religious organizations' views on issues of morality, crime, and punishment to that society's standards of decency is well recognized. Indeed, "[f]or the vast majority of humankind, crime, punishment, and reform are still inextricably bound up with religious views about sin, judgment, and forgiveness." David R. Loy, *Healing Justice: A Buddhist Perspective, in* The Spiritual Roots of Restorative Justice, 81 (Michael L. Hadley ed., 2001). There are few, if any, institutions that can claim a greater tradition of working with and studying the conscience of the human person and related questions of guilt, blame, and suffering than those of the religious community.

This Court has frequently taken notice of the opinions of religious organizations when confronting

issues involving contemporary standards of decency and morality. For example, in *Atkins v. Virginia*, this Court cited the brief of amici curiae filed by the United States Conference of Catholic Bishops and other religious organizations as "evidence" of a broad "social and professional consensus" against the execution of persons with mental retardation. 536 U.S. 304, 316 n.21 (2002); *see also Stanford v. Kentucky*, 492 U.S. 361, 388 n.4 (1989) (Brennan, J. joined by Marshall, Blackmun, and Stevens, JJ., dissenting) (relying on the opinion of a coalition of religious groups when considering the constitutionality of the juvenile death penalty).

Amici, as members of the religious community, are uniquely positioned to provide invaluable guidance regarding the issue presented in these cases: whether sentencing juveniles to life imprisonment without the possibility of parole for non-homicide offenses is contrary to contemporary standards of decency and therefore violates the Eighth Amendment's prohibition of cruel and unusual punishment. Their religious traditions—Christianity, Judaism, Islam, and Buddhism—have played influential roles in societal discourses about morality and criminal punishment throughout history, and continue to do so today. An overwhelming majority of Americans continue to rely on the teachings and instructions of these faith traditions on matters of morality and justice.[2]

---

[2] According to the 2008 American Religious Identification Survey, nearly 80% of American adults identified themselves as an adherent of at least one of the religious traditions represented by amici. Barry A. Kosmin & Ariela Keysar, American Religious Identification Survey (2008), http://www.americanreligionsurvey-aris.org/reports/ARIS_Report_2008.pdf.

For the reasons set forth below, amici unanimously assert that imposing life imprisonment without the possibility of parole on juveniles convicted of non-homicide offenses is contrary to the values and beliefs of the faith traditions they represent. Such a punishment violates contemporary standards of decency and, accordingly, must be held unconstitutional.

II. Sentencing Juvenile Offenders to Life Imprisonment Without the Possibility of Parole for Non-Homicide Crimes Disregards the Special Status That Juveniles Are Accorded Due to Their Diminished Capacity

Juveniles are not simply small adults. They are still in the process of mental and physical development. They lack the wealth of life experience, appreciation of the consequences of their actions, and the maturity that adults possess. Consequently, juveniles are recognized as less able to control their impulses and to conform their conduct to the requirements of civilized society and as more likely to make poor decisions.

Throughout human history, social institutions and societies themselves have drawn distinctions between the behavior that is expected of children and of adults and have imposed different consequences when those expectations are not met. In particular, all of the religions represented by amici have recognized juveniles' special developmental status, assigned them less moral culpability, and accorded them more lenient treatment in criminal matters. Secular law at the state, federal, and international levels mirrors these distinctions. To condemn juveniles who commit non-

homicide offenses to spend their entire lives incarcerated is to disregard the accumulated experience of all of these societal institutions. Doing so is an act so far outside of the moral standards of modern American society as to constitute cruel and unusual punishment.

A. Christianity, Judaism, Islam, and Buddhism Accord Juveniles Special Treatment on Account of Their Lesser Mental Sophistication, Both Generally and with Respect to Criminal Matters in Particular

The fact that children are less mature and responsible than their adult counterparts is well-recognized within all of amici's religious traditions.[3] Children's view of the world, their understanding of moral behavior, and the degree to which they are able to comprehend the consequences of their actions, are far more limited than those of adults. As noted in the New Testament: "When I was a child, I spoke as a child, I understood as a child, I thought as a child: but when I became a man, I put away childish things." 1 Corinthians 13:11. Likewise, the Prophet Muhammad is recorded to have said that "the pen (of legal capacity and legal obligation) has been lifted from three (classes): the insane, until he regains intellectual capacity, the minor

---

[3] Admittedly, variation exists among and within amici's various religions as to the exact age when one ceases being a juvenile and becomes an adult. *See, e.g.*, 4 Al-Fiqh al-Islami wa Adillatuh (Islamic Jurisprudence and its Proofs) (11 volumes) 2971 (Damascus: Dar al-Fikr al-Mu'asser, 1997) (looking to local culture to determine the line between being a juvenile and adulthood). This does not detract from the larger point, however, that all of amici's faith traditions draw this distinction.

until he reaches the age of majority, and the sleeping person until he awakens." 4 'Abd al Ghafar Sulayman al-Bandari (ed.) Sunan al-Nasa'i al-Kubra li Ahmad ibn Shu'ayb al-Nasa'i 324 ##7346 (Beirut: Dar al-Kutub al-'Ilmiya, 9th century reprint 1991).

These distinctions have been enshrined within amici's religious doctrines, as evidenced in the Talmud, which explains that because minors have limited mental capacity they are to be excluded from certain ritual activity: for example, they are prohibited from writing particular legal documents unless an adult co-writes such documents, and they are exempted from certain religious obligations. *Babylonian Talmud* ("*BT*") *Hagiga* 2b; *BT Gittin* 23a. Similarly, Islamic law states that minors are inherently deficient in judgment until they reach the age of majority. 8 Al-Mawsu'ah al-Fiqhiyyah 195-196 (Kuwait: Ministry of Awqaf [Religious Endowments], 1995).

Religious teachings concerning crime and punishment uniformly accord juveniles special treatment in light of their partially developed mental and moral state. It is a point of consensus in the Islamic legal tradition, for example, that minors as a class are not considered to hold full legal capacity and are therefore exempt from legal obligations and severe penalties. Al-Mawsu'ah al-Fiqhiyyah, *supra*, at 196. Consequently, the Islamic legal tradition prohibits the imposition of lifetime imprisonment without the possibility of parole on minors, as it is considered to be an extreme punishment greater than any crime that could be committed by an individual lacking full legal capacity. Similarly, minors, as a class, are also exempt

from the most dire forms of punishment under Jewish law. *BT Sanhedrin* 52b, 54a, 54b.

B. The Distinctions Drawn by Christianity, Judaism, Islam, and Buddhism with Respect to Juveniles Are Supported by Science and Mirrored in State and Federal Law, As Well As the Laws of Other Nations

Amici's faith traditions are not alone in according juveniles special treatment; society at large recognizes the meaningful differences between adults and juveniles. Scientific studies, for example, have confirmed what we all know from experience: the brain continues to develop through late adolescence, as do core mental functions like planning, judgment and emotional control. *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, American Psychologist 58(12) 1009-18 (Dec. 2003).[4] These findings have led

---

[4] *See also* MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, Issue Brief 3: *Less Guilty by Reason of Adolescence* (2006), *available at* http://www.adjj.org/content/page.php?cat_id=2&content_id=28; Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* (Oct. 2005) (citing Jay N. Giedd, et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 Nature Neuroscience 861(1999) and Kenneth K. Kwong, et al., *Dynamic Magnetic Resonance Imaging of Human Brain Activity During Primary Sensory Stimulation*, 89 Proceedings of the National Academy of Science 5675 (1992)), *available at* http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf.

researchers to conclude that juveniles should not be held to the same standards of criminal responsibility as adults, because adolescents' decision-making capacity is diminished, they are less able to resist coercive influence, they do not fully appreciate the negative consequences of their actions, they are less susceptible to deterrents, and their character is still developing. *See id.*

American law also draws many distinctions between adults and juveniles on account of children's reduced mental development. All fifty states have established minimum age requirements to vote,[5] marry,[6] join the military,[7] obtain a driver's license,[8] and consume alcohol.[9] The federal government makes similar distinctions, and even the United States Constitution itself imposes minimum age limitations for elected officials.[10] Underlying all of these laws is our collective belief that the physical and mental immaturity of youth requires special treatment because individuals are only able to

---

[5] *See, e.g.*, Cal. Elec. Code § 2000 (2008); Fla. Stat. Ann. § 97.041 (2009); 25 Pa. Stat. Ann. § 2811 (2008).

[6] *See, e.g.*, Ind. Code § 31-11-1-4 (2009); Wash. Rev. Code § 26.04.010 (2009); Ohio Rev. Code Ann. § 3101.01 (2009).

[7] *See, e.g.*, Ga. Code Ann. § 38-2-3 (2009); N.Y. Mil. Law § 2 (Consol. 2009); 20 Ill. Comp. Stat. Ann. 1805/1 (2009).

[8] *See, e.g.*, Conn. Gen. Stat. § 14-36 (2009); Del. Code Ann. tit. 21, § 2710 (2009); Minn. Stat. § 171.04 (2009).

[9] *See, e.g.*, Vt. Stat. Ann. tit. 7, § 658 (2009); N.C. Gen. Stat. § 18B-302 (2009); R.I. Gen. Laws § 3-8-4 (2009).

[10] U.S. Const. art. I, §§ 2, 3; U.S. Const. art. II, § 1.

understand and anticipate the consequences of their actions upon the transition from childhood to adulthood. Indeed, this Court, in reversing a sentence of capital punishment for a defendant who was sixteen at the time he was convicted, has acknowledged the important differences between juveniles and adults:

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly, "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults.

Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982) (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)) (footnotes omitted); *see also Roper v. Simmons*, 543 U.S. 551, 569 (U.S. 2005) (relying on the "general differences between juveniles under 18 and adults" to hold that imposing the death penalty on any juvenile offender violated the Eighth Amendment).

The laws of other nations also recognize the special status of juveniles, as does international law. Essentially all nations have laws that, like the American laws

discussed above, restrict certain rights to adults because of their increased maturity and mental development.[11]

This international consensus regarding juveniles' developing status has also translated into universal special treatment for juveniles under criminal laws. To take one example, the United Nations General Assembly has adopted a sequence of resolutions stating that the primary aim of juvenile justice is not retribution but promoting the well-being of the juvenile, that long-term incarceration of juveniles does them great harm, and that confinement shall be imposed on juveniles for the shortest possible period, and only as a last resort. *See* G.A. Res. 40/33, U.N. GAOR, 40th Sess., U.N. Doc. A/RES/40/33 (1985) (1985 Beijing Rules); G.A. Res. 45/113, U.N. GAOR, 45th, Sess., 68th plen. mtg., U.N. A/RES/45/113 (1990) (1990 U.N. Rules for the Protection of Juveniles Deprived of Their Liberty); G.A. Res. 45/112, U.N. GAOR, 45th Sess., Supp. No. 49A, at 201, U.N. Doc. A/45/RES/112 (1990) (1990 Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)). In addition, the Convention on the Rights of the Child, ratified by every nation except for the United States and Somalia, requires signatory states to give juveniles special treatment in criminal justice matters. *See, e.g.*, Convention on the Rights of the Child,

---

[11] *See, e.g.*, Armed Forces Act, 2006, c. 52, § 328 (providing minimum age requirements for persons enlisting in the military in the United Kingdom), *available at* http://www.opsi,gov.uk/acts/acts.2006/pdf/ukpga_20060052_en.pdf.; Austl. Cap. Terr. Consolidated Acts, Liquor Act 1975, Part 10, Division 10.2, § 151-58 (establishing minimum age requirements for drinking alcoholic beverages in Australia), *available at* http://www.austlii.edu.au/au/legis/act/consol_act/la1975107/.

G.A. Res. 44/25, U.N. GAOR, 44th Sess., art. 37(c), U.N. Doc. A/RES/44/25 (1989; entry into force Sept. 2, 1990). ("Every child deprived of liberty shall be treated . . . in a manner which takes into account the needs of persons of his or her age.").

Further, there is near consensus among nations that it is never appropriate to sentence juvenile offenders to life imprisonment without the possibility of parole. The Convention on the Rights of the Child prohibits sentencing children to life imprisonment without the possibility of release for any crime, including homicide offenses. *Id.* art. 37(a). The United Nations General Assembly recently passed a resolution calling for the immediate elimination of sentences of life imprisonment without the possibility of release for all juveniles. G.A. Res. 61/146, ¶ 31, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/146 (2007).

According to a recent report, the United States is one of only two countries in which individuals who committed their underlying offenses while minors are currently serving such sentences. Center for Law and Global Justice, University of San Francisco School of Law, Report on Human Rights Violations, *Sentencing Our Children to Die in Prison,* Global Law and Practice 4 (2007). Subjecting juvenile offenders—particularly those who have not committed homicide offenses—to sentences that guarantee they will spend their entire lives incarcerated is far outside of international practice in every other nation in the world. *See also Roper v. Simmons*, 543 U.S. 551 (2005) ("It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain

fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.").

C. Sentencing Juveniles to Life Imprisonment Without the Possibility of Parole for Non-Homicide Offenses Constitutes Cruel and Unusual Punishment Because It Disregards the Longstanding Societal Consensus That Juveniles Merit Special Treatment

To impose the punitive sentence of life imprisonment without the possibility of parole—the most severe punishment in the American criminal justice system, other than capital punishment, *see Solem v. Helm*, 463 U.S. 277, 303 (1983)—on individuals under the age of eighteen is to ignore the special status that juveniles hold in our society due to their immaturity and inexperience. Mr. Graham was only sixteen years old at the time he committed the underlying offense that led to his sentence of life imprisonment without the possibility of parole; Mr. Sullivan was only thirteen years old when he committed his offense. Condemning Mr. Graham, Mr. Sullivan, and similar offenders to die in prison without the possibility of ever becoming eligible for release stands in clear violation of amici's religious traditions.

Such a punishment is especially inappropriate for juvenile offenders like Mr. Sullivan and Mr. Graham because their crimes, while grave, were non-homicides. Mr. Sullivan is one of only two thirteen-year-olds in the United States to have received such a sentence for an offense in which no one was killed. Brief of Petitioner-

Appellant at i, *Sullivan v. Florida*, No. 08-7621 (U.S. filed July 16, 2009). In light of this Court's holding in *Roper*, 543 U.S. at 579, that it is unconstitutional to impose the death penalty on individuals under the age of eighteen when their offenses are committed, life without the possibility of parole is the ***most*** severe sentence available to juvenile offenders in this country. Yet it is axiomatic within this country's legal system that only the most deserving class of offenders receive the most punitive sentences. *Cf. Kennedy v. Louisiana*, 128 S. Ct. 2641, (2008) (holding that it is unconstitutional to impose the death penalty on adults who have not committed capital murder). Sentencing juveniles who commit non-homicide offenses to life imprisonment without the possibility of parole violates that bedrock principle.

The overly punitive sentence of life imprisonment without the possibility of parole for juveniles convicted of non-homicide offenses fails to account for the inherent differences between youth and adults. Such blindness cannot be reconciled with amici's faith traditions or the morals and ethics of contemporary American society.

III. Imposing Life Imprisonment Without the Possibility of Parole on Juvenile Offenders Contravenes Fundamental Religious Values

In addition to being morally unjustifiable because it does not recognize the special status of children, such a sentence offends the well-established religious principle that all individuals—especially those who are weak and vulnerable, such as children—are entitled to mercy, forgiveness, and compassion. Moreover, the

sentence of life imprisonment without the possibility of parole also denies juvenile offenders the opportunity for meaningful rehabilitation and conflicts with the concept of restorative justice, which all of amici's faith traditions embrace. Any punishment that so thoroughly conflicts with the values and principles that have been adopted by all the religions represented by amici and embraced by a majority of Americans must violate contemporary "standards of decency."

A. Imposing Such a Punitive Sentence on Juvenile Offenders Contravenes Religious Teachings That Tell Us That All Individuals, and Particularly Juveniles, Are Deserving of Mercy, Forgiveness, and Compassion

Amici, despite the diversity within their beliefs and religious traditions, champion mercy, forgiveness, and compassion as fundamental values that must be extended to everyone.

First, each religion acknowledges the centrality of mercy. In Christianity, for instance, Jesus' self-sacrificial death on the cross for the sins of humanity is viewed as the ultimate act of mercy, *Titus* 3:5 ("[Jesus] saved us, not because of righteous things we had done, but because of his mercy."), and Christians are called to replicate his example in their daily interactions. *See, e.g.*, *Matthew* 5:7 ("Blessed are the merciful, for they shall obtain mercy."). Likewise, mercy is a foundational principle in Islam, *Qur'an* 7:156 ("My mercy encompasses all things"); *Qur'an* 6:54 ("Your Lord hath inscribed for Himself (the rule of) mercy . . . . He is Oft-Forgiving, Most Merciful."), and Muslims are obligated

to show mercy. Judaism depicts God as "merciful and gracious, long-suffering, and abundant in goodness and truth." *Exodus* 34:6. The *Talmud* discusses the idea of *imitatio dei*, that man is supposed to emulate God and be compassionate and merciful, *BT Shabbat* 133b, *JT Pe'ah* 1:1, and it commands judges to be merciful and compassionate when deciding cases. *See Sanhedrin* 29a.

Second, amici's religions also stress the importance of forgiveness, urging their adherents to forgive those who have wronged them. Jesus' admonition to his disciples to "turn the other cheek" is well known; the *Bible* also commands that we should "[b]ear with each other and forgive whatever grievances [we] may have against one another."[12] The *Qur'an* describes the righteous as those who "spend freely [in charity] whether in prosperity or adversity, restrain anger, and forgive others," 3:134. It also commands people to forgive each other: "Hold to forgiveness, enjoin what is right, and turn away from the ignorant." 7:199. While the *Qur'an* states that "the recompense for an injury is an injury equal thereto," it immediately continues to say "but if a person forgives and makes reconciliation, his reward is due from God, for God loveth not those who do wrong . . . indeed if any show patience and forgive that would truly be an exercise of courageous will and resolution in the conduct of affairs." 42:40-43.

---

[12] The following, oft-repeated conversation between Jesus and his disciple Peter reveals the centrality of forgiveness in Christian theology: "Then Peter came up and said to him, 'Lord, how often shall my brother sin against me, and I forgive him? As many as seven times?' Jesus said to him, 'I do not say to you seven times, but seventy times seven.'" *Matthew* 18: 21-2.

Third, underlying the focus on mercy and forgiveness is the belief, found in all faith traditions represented by amici, that human action should be guided by compassion. For example, prominent Jewish philosopher and rabbi Maimonides once explained that "[t]he purpose of the laws of the Torah is to promote compassion, loving-kindness and peace in the world." Maimonides, *Yad Hachazakah, Hilchot Shabbat* 2:3; *see also Ethics of the Fathers* 1:2 ("On three things the world is sustained: on the Torah, on the (Temple) service, and on deeds of loving kindness."). Likewise, compassion is stressed within Islam as well. Muslims are encouraged to "urge each other to patience, deeds of kindness and compassion; indeed those are the companions of the right." *Qur'an* 90: 17-18. Similarly, the importance of compassion in Buddhism is exemplified by the teaching to "not show disregard for thy unhappy kindred, compassion for all creatures is the true religion." Aèvaghoùa, *The Buddha-Carita, or The Life of Buddha*, Book IX: 17 (Edward B. Cowell, ed. & trans., New Delhi 1977).

In short, religious texts make clear that each of these three values—mercy, forgiveness, and compassion—must guide interpersonal and societal relations, and are to serve as the bedrock principles for a just and fair society. These values are so essential that those who fail to apply them risk delegitimizing the sincerity of their claim of devotion. One Talmudic source explains:

> [I]f a person exhibits impudence, cruelty, or misanthropy, and does not perform acts of loving-kindness, one should strongly suspect

> that he is of non-Jewish descent; for Israel, the holy nation, has the three distinctive traits of "modesty, mercy, and loving-kindness."

Yevamot 79a. Similar concepts are found in all of amici's faith traditions.[13]

Inflicting the sentence of life imprisonment without the possibility of parole, the most severe punishment available to juvenile offenders, on a young person who has committed a non-homicide offense is an act without mercy, forgiveness, or compassion. This is especially true given that juveniles who commit serious crimes often come from disadvantaged backgrounds: many are poor, and frequently they have been the victims of abuse and neglect.[14] These are exactly the type of children amici's faith traditions stress are most deserving of kindness and compassion. *Cf., e.g., Psalms* 82:3 ("Defend the cause of the weak and fatherless; maintain the rights of the poor and oppressed."); *Qur'an* 2:83 ("[T]reat with

---

[13] For example, Jesus criticized the Pharisees for emphasizing legalism over more fundamental concerns for mercy and compassion. *Matthew* 23:23 ("Woe to you, scribes and Pharisees, hypocrites! For you tithe mint, dill, and cumin, and have neglected the weightier matters of the law: justice and mercy and faith. It is these you ought to have practiced without neglecting the others.").

[14] *See* The Center for Law and Global Justice, University of San Francisco School of Law, Report on Human Rights Violations, *Sentencing Our Children to Die in Prison*, Global Law and Practice 20 (2007) (explaining that juvenile offenders often face "problems such as lack of familial support, insufficient access or motivation for education, poverty, and lack of access to employment opportunities").

kindness your parents and kindred, and orphans and those in need; speak fair to the people . . . and practice regular charity."); *James* 1:27 ("Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress."). Imposing such a harsh punishment on such a vulnerable population cannot be reconciled with the fundamental values represented by amici's faith traditions and broadly accepted by American society.

This does not suggest that juvenile offenders should be rendered immune from punishment. Amici agree that the law must be followed and that those who fail to comply should suffer sanction. But, in amici's religions, the sanction, must be tempered by mercy, forgiveness, and compassion in order to be just. A prominent rabbi, Emanuel Rackman, has observed that the notions of justice and charity are "grafted" together within the Jewish tradition; "[i]n the Bible one invariably finds the two words 'charity and justice' as a compound phrase." Martin Sicker, *The Political Culture of Judaism* 100 (2001). Similarly, St. Augustine once wrote:

> Fulfill, Christian judge, the duty of an affectionate father; let your indignation against their crimes be tempered by consideration of humanity; be not provoked by the atrocity of their sinful deeds to gratify the passion of revenge, but rather be moved by the wounds which these deeds have inflicted on their souls to exercise a desire to heal them.

Letter 133 from Saint Augustine to Marcellinus (A.D. 412), *in* 1 Nicene and Post-Nicene Fathers, First Series, Vol. 1 (J.G. Cunningham trans., Philip Schaff ed., 1887), *available at* http://www.newadvent.org/fathers/1102133.htm (revised and edited for New Advent by Kevin Knight).[15]

Imposing life imprisonment without the possibility of parole on juvenile offenders convicted of non-homicide offenses stands in marked contrast to the message of mercy, forgiveness, and compassion embraced by all of the religious traditions represented by amici. There is no mercy or compassion in sentencing an adolescent who, while still in the immaturity and indiscretion of youth, has made mistakes and broken the law, to a life confined within the walls of a prison. Such a punishment is cruel and unusual and undoubtedly violates contemporary "standards of decency."

B. Sentencing Juvenile Offenders to Life Imprisonment Without the Possibility of Parole Denies Them Their Potential for Rehabilitation and Development

When sentencing Mr. Graham to life imprisonment without the possibility of parole, the Florida court

---

[15] Muslim jurists also agree that justice and mercy go hand in hand. The famous medieval jurist Ibn al-Qayyem explains that "Shari'ah law in its foundation and construction is based upon . . . [serving] public interest . . . and it is all justice and all mercy . . . ." 7 Al-Fiqh al-Islami wa Adillatuh (islamic Jurisprudence and its Proofs) (11 volumes) 5552 (Damascus: Dar al-Fikr al-Mu'asser, 1997).

concluded from his "escalating pattern of criminal conduct," that "there is nothing we can do for you." Brief of Petitioner-Appellant at 22, *Graham v. Florida*, No. 08-7412 (U.S. filed July 16, 2009). Such a statement epitomizes the travesty of imposing life imprisonment without the possibility of parole on juvenile offenders convicted of non-homicide offenses: it fails to recognize the tremendous potential that juveniles have to grow, develop, and be rehabilitated. The *Graham* court's nihilistic view of juvenile offenders is antithetical to the perspectives of amici's faith traditions and of American society at large.

Children, by definition, are in a state of partial and incomplete development. *See supra* pp. 5-10. Because they are still maturing and learning to interact with society, they are uniquely suited to rehabilitation if placed within the right environment. Many juvenile offenders have been raised in abusive or neglectful home environments and have lacked positive influences in their lives to guide them and prepare them to become productive members of society. Amici believe that it is possible to reform any juvenile offender over the course of his or her lifetime and prepare him or her to lead a responsible, low-abiding existence outside of prison.

In *Roper*, this Court adopted the same view, acknowledging juvenile offenders' potential for growth and rehabilitation:

> From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will

> be reformed. Indeed, the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.

543 U.S. at 570 (quotation marks and citation omitted).

Amici embrace the notion that just punishment must allow for the offender to be rehabilitated and restored to the community when possible. For example, Jewish law states that the purpose of the judicial system is not merely to punish or exact revenge, but to facilitate human development and *tshuvah* ("returning from bad deeds" or "repentance"). Similarly, the Islamic legal concept of *ta'zir* punishment,[16] imposed for non-homicidal crimes, is concerned with both deterring the criminal from committing future crimes and reforming and rehabilitating him. Mohamed S. El Awa, *Punishment in Islamic Law* 96, (Indianapolis: American Trust Publications, 1982).

The focus on rehabilitation within amici's faith traditions is also evident through each of their embrace of the principle of "restorative justice." This concept involves constructing a system of justice "that moves from punishment to reconciliation, from vengeance against offenders to healing for victims, from alienation

---

[16] The word *ta'zir* is derived from the Arabic verb *azar*, which means to prevent, to respect, and to reform. *See* Mohamed S. El Awa, *Punishment in Islamic Law* 96, (Indianapolis: American Trust Publications, 1982).

and harshness to community and wholeness, from negativity and destructiveness to healing, forgiveness, and mercy." Michael L. Hadley, *Introduction: Multifaith Reflection on Criminal Justice, in* The Spiritual Roots of Restorative Justice 8 (Michael L. Hadley ed., 2001). True restorative justice is achieved when an offender turns away from his or her misdeeds and returns to the community to contribute as an active member of society.[17]

In Buddhism, this type of justice is represented most vividly through the story of Angulimala, a merciless bandit and murderer, who abandons his life of lawlessness and violence after a peaceful encounter with the Buddha. *Theragatha* 866-91; *Majhima Nikaya*, Angulia Sutta. When the king and his subjects learn that Angulimala has been reformed, they decide that he has suffered enough and that there is no need to further punish him for his past wrongs and sins. *Id.* This story, one of the most important within the Buddhist tradition, "highlights the only reason Buddhism accepts for punishing an offender: to help re-

---

[17] Restorative justice is a foundational principle in Islam as well. Mohamed S. El Awa, *Punishment in Islamic Law* 104 (Indianapolis: American Trust Publications, 1982). For example, in the Islamic legal tradition, the *ta'zir* punishment of lifetime imprisonment without parole is imposed on habitual criminals who cannot be reformed. *Id.* However, there is an important condition for the imposition of this punishment: it can only be applied as long as the reform of the offender is viewed as completely impossible. *Id.* It is presumed that all minors have the potential to reform their behavior and redeem themselves upon reaching adulthood. Consequently, Islamic law prohibits the imposition of lifetime imprisonment without parole on minors, as a punishment greater than any crime that could be committed by someone of such a status. *Id.*

form his or her character." David R. Loy, *Healing Justice: A Buddhist Perspective, in* The Spiritual Roots of Restorative Justice, 81 (Michael L. Hadley ed., 2001).

The sentences that Mr. Graham and Mr. Sullivan received cannot be reconciled with the principle of restorative justice because such sentences never give offenders the opportunity to rejoin society. It is impossible to create a fully actualized system of restorative justice without this possibility; in order to be fully effective, "restorative justice should not be allowed to end with punishment or at the walls of the prison." Luc Roberts & Tony Peters, *How Restorative Justice Is Able To Transcend the Prison Walls: A Discussion of the "Restorative Detention" Project, in* Restorative Justice in Context: International Practice and Directions 95, 98 (Elmar G.M. Weitekamp & Hans-Jurgen Kerner eds., 2003).

The sentence of life imprisonment without the possibility of parole for juveniles convicted of non-homicide offenses is unjust because it does not reflect juveniles' vast potential for change and denies them any meaningful opportunity to ever rejoin society.

C. The Fundamental Values Espoused by Christianity, Judaism, Islam, and Buddhism Demand That Juvenile Offenders Like Mr. Sullivan and Mr. Graham Be Given the Possibility of Parole

In contemporary American society, both retribution and incapacitation are among several justifications for punishment, *see, e.g.*, *Kennedy v. Louisiana*, 128 S. Ct.

2641, 2649 (2008) ("[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution."); *United States v. LaBonte*, 520 U.S. 751, 779 (1997) ("the basic goals of punishment [are] . . . deterrence, incapacitation, just deserts, [and] rehabilitation"), and amici acknowledge that incarcerating juveniles who pose a danger to the public is recognized a valid penological goal. However, sentencing juveniles who are convicted of severe, but non-homicide, crimes to life imprisonment without the possibility of parole runs afoul of amici's shared belief that justice requires that this class of offenders be given the opportunity of release.

The institution of parole serves an important function within our criminal justice system. *See Morrissey v. Brewer*, 408 U.S. 471, 477 (1972) (explaining that "the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system"). Under the systems of parole used by a number of states, "parole is granted by the discretionary action of a board, which evaluates an array of information about a prisoner and makes a prediction whether he is ready to reintegrate into society." *Id.* at 477-78. Thus, parole boards and similar institutions and programs that allow for the conditional or early release of prisoners not only allow for correctional departments to make informed and individualized judgments about the continued threat that offenders pose to the public, but they also provide offenders with an opportunity to make a case for why, given their efforts at reform and rehabilitation, they are deserving of release.

Mr. Sullivan and Mr. Graham, under the sentences they are currently serving, will never have such an opportunity. Any efforts they have taken to atone for their crimes, seek rehabilitation, or lay the groundwork for leading a productive, responsible life outside of their prison walls cannot be factored into their punishment. They are joined by over one hundred other juveniles in this country who like them have not committed the most serious offense—homicide[18]—but can never hope for the possibility of release, even if they avail themselves of the full array of rehabilitative options available within prison.[19] It is simply impossible to reconcile amici's faith

---

[18] A study prepared by Florida State University found that there are currently at least 111 juveniles convicted of non-homicide offenses serving sentences of life imprisonment without the possibility of parole. Paolo Annino, et al., Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation (2009), *available at* http://www.law.fsu.edu/faculty/profiles/annino/Report_JuvenileLifeSentence.pdf.

[19] There is a broad variety of programs that take widely differing approaches to reforming and rehabilitating offenders, and the diversity of offerings continues to expand. *See, e.g.*, Barry Krisberg, *Reforming Juvenile Justice*, THE AMERICAN PROSPECT, August 14, 2005, *available at* http://www.prospect.org/cs/articles?article=reforming_juvenile_justice (discussing how many jurisdictions are embracing a federal initiative called Balanced and Restorative Justice, which provides "the youthful offender . . . a way to restore his or her role in the community" through, among other things, involving victims in the rehabilitation process); *The Right Model for Juvenile Justice*, N.Y. TIMES, Editorial, Oct. 28, 2007, *available at* http://www.nytimes.com/2007/10/28/opinion/28sun2.html (discussing another model, pioneered by Missouri and being imitated across the country, that does away with "mass kiddie prisons in favor

(Cont'd)

traditions with the imposition of this permanent, unforgiving sanction on individuals who, at the time of their respective offenses, were not even old enough to fully comprehend their actions and the attendant consequences.

Parole and similar programs are among the few places within our criminal justice system that allow for consideration of the values and principles discussed above: mercy, forgiveness, compassion, redemption, and restorative justice. In order for our nation's criminal justice system to comport with these values and principles, which have been embraced by a majority of the American people, juvenile offenders convicted of non-homicide offenses must be provided with the opportunity to demonstrate that they are no longer a danger to the community and can rejoin society.

(Cont'd)

of small community-based centers that stress therapy, not punishment" and that, to the extent possible, keeps young people "near their homes so their parents can participate in rehabilitation that includes extensive family therapy").

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court vacate Messrs. Graham and Sullivan's sentences on the ground that the imposition of life imprisonment without the possibility of parole on juveniles convicted of non-homicide offenses violates the Eighth Amendment's guarantee against cruel and unusual punishment.

Respectfully submitted,

MICHAEL B. DE LEEUW
Counsel of Record
JOHNATHAN SMITH
JORDAN BARRY
DALE HO
GRACE DAVIES
FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON LLP
One New York Plaza
New York, New York 10004
(212) 859-8000

Attorneys for Amici Curiae

APPENDIX

APPENDIX

1. American Association of Jewish Lawyers and Jurists. The American Association of Jewish Lawyers and Jurists ("AAJLJ") is a membership association of lawyers and jurists open to all members of the professions regardless of religion. It is an affiliate of the International Association of Jewish Lawyers and Jurists, which is based in Israel and was founded by the late Justice Arthur Goldberg of the United States Supreme Court and the late Justice Haim Cohen of the Supreme Court of Israel. The mission of AAJLJ is to promote an understanding of the principles of traditional Jewish law among the bar, the judiciary and the public, including an understanding of the relevance and applicability of Jewish law to current legal issues and controversies, through participation as amici in appropriate cases, educational programs and other means of outreach.

2. American Catholic Correctional Chaplains Association. The American Catholic Correctional Chaplains Association ("ACCCA") is a national Catholic organization committed to promoting the principles of restorative justice for all involved with, or affected by, the criminal justice system.

3. American Correctional Chaplains Association. The American Correctional Chaplain's Association ("ACCA"), an affiliate of the American Correctional Association, serves as a professional organization for pastoral care personnel in the corrections field. It provides a network for the sharing of information and resources amongst its members and with corrections administrators, and it formulates standards for

chaplaincy and religious programming in correctional facilities. ACCA strongly believes that the accommodation of spiritual development and religious study in the prison context are exceptionally valuable aids to rehabilitation.

4. American Friends Service Committee. The American Friends Service Committee ("AFSC"), the social justice and peace organization formed by the Religious Society of Friends (Quakers) in 1917, has worked with prisoners, their families, and prison officials since 1947. AFSC's work stems from the belief that the way a society treats people convicted of crimes is an indicator of the human values of that society and Quakers' belief in the intrinsic worth of all human beings.

5. Buddhist Peace Fellowship. The Buddhist Peace Fellowship ("BPF") was founded in 1978 to serve as a catalyst for socially engaged Buddhism. BPF envisions a future in which people from all backgrounds come into a heartfelt realization of our interconnection to each other and to the Earth. We believe that actions generated from this understanding will create societies guided by generosity, compassion, wisdom, and justice. We are committed to helping beings liberate themselves from the suffering that manifests in individuals, relationships, institutions, and social systems.

6. Church Women United. Since our founding in 1941, Church Women United ("CWU") has worked for and supported the rights of women and children. CWU strives to express God's love, mercy, kindness, and

forgiveness through its work for peace and justice, and we call upon the criminal justice system to do the same.

7. The Council of Churches of the City of New York, Inc. The Council of Churches of the City of New York, Inc., is the oldest ecumenical council in the United States. Founded in 1895, it is today a council of the major representative religious organizations representing the several Protestant and Orthodox denominations having ministry in the City of New York. It is governed by a Board of Directors comprised of the bishop or equivalent officer of each local diocese, association, synod, presbytery, conference, or district of its member denominations and of the president and executive officer of the local councils of churches serving in each of the boroughs of the City of New York.

8. Engaged Zen Foundation. The Engaged Zen Foundation ("EZF") is an American Buddhist group originally founded as a prison outreach group. Its experience working in prisons throughout the United States since 1994 has compelled it to expand its efforts to focus on the complete circle of human rights imperatives. EZF has called for a comprehensive investigation into the validity of the concept of "punishment" itself by religious people, scholars, psychologists and clinical researchers. EZF's experiences have brought the Foundation to question the efficacy of the criminal justice system's treatment of offenders and in particular the treatment of juvenile offenders who are most vulnerable.

Appendix

9. General Synod of the United Church of Christ. Amicus curiae General Synod of the United Church of Christ ("UCC") is the representative body of the national setting of the United Church of Christ and is composed of delegates chosen by its conferences from member churches, voting members of Boards of Directors of Covenanted Ministries who have been elected by General Synod as described in the Bylaws of the UCC, and ex officio delegates. The UCC was formed in 1957, by the Union of the Evangelical and Reformed Church and The General Council of the Congregational Christian Churches of the United States in order to express more fully the oneness in Christ of the churches composing it, to make effective their common witness to Christ, and to serve God's people in the world. The UCC has 5,600 churches in the United States, with a membership of 1.2 million.

10. Islamic Shura Council of Southern California. The Islamic Shura Council is an umbrella organization of Mosques and Muslim organizations, serving more than half a million Muslims in Southern California.

11. Karamah: Muslim Women Lawyers for Human Rights. KARAMAH is a charitable, educational organization that focuses on the domestic and global issues of human rights, especially those of Muslim women. It is founded upon the ideal that education, dialogue, and action can counter the dangerous and destructive effects of ignorance, silence, and prejudice. KARAMAH envisions a world in which all human beings, regardless of their gender or other differences, enjoy

their God-given right to dignity, which cannot be achieved without liberty and justice. The name KARAMAH is rooted in the Qur'anic verse: "We have given dignity (karamah) to the children of Adam." (17:70).

12. Mormons for Equality and Social Justice. Mormons for Equality and Social Justice ("MESJ") is a grassroots organization of Latter-day Saint individuals who are "anxiously engaged" (D&C 58:27) in working for the gospel values of peace, equality, justice, and wise stewardship of the earth in a spirit of Christ-like charity and concern. As Latter-day Saints, we come from a heritage of people who had "a vision of a different world, a world where injustice and oppression, poverty and ignorance would be dispelled and a world where men and women would be brothers and sisters." Alexander B. Morrison, CHURCH NEWS, Oct. 14, 1995.

13. National Council of the Churches of Christ in the United States of America. The National Council of the Churches of Christ in the USA ("NCC") is a community of 35 national Christian denominations, communions and conventions with 45 million adherents in 100,000 local congregations located in every state. The Council publishes the Revised and New Revised Standard Versions of the Bible and the Yearbook of American and Canadian Churches, and is engaged in interfaith dialogue, education and communication projects. The Council's member churches also maintain a strong witness on the moral and ethical dimensions of national policy issues ranging from the environment and peace to poverty and religious liberty. This witness is

based on a carefully crafted body of agreement on these issues developed over many decades of work together.

14. National Council of Jewish Women. The National Council of Jewish Women ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Principles and Resolutions state that NCJW resolves to work for "the recognition and protection of children by the legal system and the provision for their unique needs." Consistent with our Principles and Resolutions, NCJW joins this brief.

15. New Jersey Regional Coalition. The New Jersey Regional Coalition is a faith-based, grassroots organization comprised of groups from throughout New Jersey devoted to working together for the common good in eradicating all forms of segregation and in promoting equality in education, criminal justice, and wherever systemic inequality exists.

16. Office of Restorative Justice, Archdiocese of Los Angeles. The Office of Restorative Justice (ORJ) provides pastoral care for offenders, victims, and families of both. We employ education and outreach to effect changes in public policy and to transform the criminal justice system. We challenge the Church to respond to Jesus' invitation to walk with the prisoner

and comfort those who mourn. ORJ is a catalyst that sparks the radical transformation of Society's attitudes toward and treatment of offenders, victims, and families of both.

17. Prison Fellowship Ministries. Prison Fellowship Ministries is a tax-exempt, charitable religious organization, that ministers to prisoners, ex-prisoners and their families. Founded in 1976 PFM offers ministry in every state and in over 100 countries. It seeks to give offenders hope in the midst of their very difficult circumstances.

18. Progressive Jewish Alliance. The Progressive Jewish Alliance ("PJA") is a California-based social justice organization that educates, advocates and organizes on issues of peace, equality, diversity and justice. PJA serves as a vehicle for connecting Jews to the critical social issues of the day, to the life of the cities in which they live, and to the Jewish tradition of working for repair of the world *(tikkun olam).* Moreover, PJA is committed to the pursuit of a more just and humane world fashioned on principles of restorative, rather than retributive, justice.

19. Queens Federation of Churches, Inc. The Queens Federation of Churches, Inc., was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of equal number of clergy and lay members elected by the delegates of member congregations at an annual

assembly meeting. Over 390 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry. We believe that a legal system that is mechanistically brutal, especially to children, lacks any moral claim to be a system of justice.

20. Rev. Dwight Lundgren. Rev. Dwight Lundgren currently serves as the director of Reconciliation Ministries for National Ministries, American Baptist Churches USA. While the American Baptist Churches USA does not have a Policy Statement of Resolution on the issue of life imprisonment for those of minor age, there are other policy statements and resolutions which reflect principles that would argue against such a practice. *See* American Baptist Policy Statement on Criminal Justice (7034:12/83); American Baptist Resolution on Restorative Justice (8212:11/01).

21. Sister JoAnne Talarico. As a 55 year member of the Roman Catholic Congregation of Humility of Mary (CHM) of Davenport, Iowa in good standing, I am called "to be attentive to the call of the spirit in the signs of our times, especially the needs of the poor and powerless . . . and to work for justice within the human family . . . ." CHM Mission Statement. For 20 years, I have been visiting a woman at the Iowa Correctional Institution for Women who was sentenced to life without parole at the age of 17. Up until that first encounter with the prison system, I had never given much thought to Juvenile Life Without Parole (JLWOP), but when I connected a real face to this issue, I felt called to pursue

it. As a Christian, I believe that Jesus gave us the supreme example of forgiveness in his work with the poor and powerless. Even though it is very difficult at times, I believe that I, along with our criminal justice system, am called to do the same.

22. Trinity United Methodist Church. Trinity United Methodist Church is a member of the Iowa Annual Conference of the United Methodist Church in good standing. As followers of Jesus Christ our faith is built on the foundation of belief in God's unfailing love for all God's children and God's grace which offers justice, redemption, and forgiveness to all. As United Methodists, our responsibilities to minister to children are spelled out in "The Social Principles of The United Methodist Church." They call for special attention to the rights of children and youth.

23. United Methodist Church, General Board of Church and Society. The General Board of Church and Society is the presence of The United Methodist Church on Capitol Hill. "The prime responsibility of the board is to seek implementation of the Social Principles and other policy statements of the General Conference on Christian social concerns. Furthermore, the board and its executives shall provide forthright witness and action on issues of human well-being, just, peace, and the integrity of creation that call Christians to respond as forgiven people for whom Christ died. In particular, the board shall conduct a program of research, education, and action on the wide range of issues that confront the Church." (2008 Book of Discipline).

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JUL 23 2009
OFFICE OF THE CLERK

Nos. 08-7412 and 08-7621

In the
Supreme Court of the United States

TERRANCE JAMAR GRAHAM,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

JOE HARRIS SULLIVAN,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

On Writs of Certiorari to the District Court of Appeals of Florida, First District

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Of Counsel:
Lawrence A. Wojcik
Kenneth L. Schmetterer
Ann Marie Bredin

H. THOMAS WELLS, JR.
Counsel of Record
PRESIDENT
AMERICAN BAR ASSOCIATION
321 N. CLARK STREET
CHICAGO, IL 60654
(312) 988-5000

Counsel for Amicus Curiae
American Bar Association

BOTH 4V6YHE

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. BASED ON THE REAL TIME THE JUVENILE OFFENDER IS LIKELY TO SPEND IN PRISON, JLWOP SHOULD BE CONSIDERED "GROSSLY DISPROPORTIONATE" UNDER THIS COURT'S JURISPRUDENCE 7

II. "THE EVOLVING STANDARDS OF DECENCY" HAVE ESTABLISHED THAT NONE OF THE STANDARD CRIMINAL JUSTICE SENTENCING THEORIES ARE SERVED BY JLWOP 10

III. NEITHER THE PUBLIC SAFETY NOR PENAL OBJECTIVES WOULD BE COMPROMISED BY PERMITTING THE OPPORTUNITY FOR PAROLE 15

IV. REVIEW OF INTERNATIONAL AUTHORITIES DEMONSTRATES OVERWHELMING OPPOSITION TO JLWOP 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Coker v. Georgia,
433 U.S. 584 (1977) 15

Enmund v. Florida,
458 U.S. 782 (1982) 12, 13

Ewing v. California,
538 U.S. 11 (2003) 7, 8, 9, 10, 14

Furman v. Georgia,
408 U.S. 238 (1972) 14

Gagnon v. Scarpelli,
411 U.S. 779 (1973) 19

Greenholtz v. Inmates of the Nebraska Penal and Corr. Complex,
442 U.S. 1 (1979) 15

Harmelin v. Michigan,
501 U.S. 957 (1991) 7, 12, 13, 14

Hussain v. United Kingdom,
22 EHRR 1 (1996) 21

Hutto v. Davis,
454 U.S. 370 (1982) 8, 10

Johnson v. Texas,
509 U.S. 350 (1993) 11, 14

PA Bd. of Prob. and Parole v. Scott,
524 U.S. 357 (1998) 15

Roper v. Simmons,
543 U.S. 551 (2005) ..... *passim*

Rummel v. Estelle,
445 U.S. 263 (1980) 8, 9

Solem v. Helm,
463 U.S. 277 (1983) 8, 9

Trop v. Dulles,
356 U.S. 86 (1958) 6, 10, 20

U.S. CONSTITUTION, STATUTES, RULES & REGULATIONS

U.S. Const. amend. VIII ..... *passim*

U.S. Const. amend. XIV ..... *passim*

220 Ind. Admin. Code 1.1-3-1 – 1.1-3-10 (2009) 18

22 Alaska Admin. Code 20.485 (2009) 18

37 Pa. Code § 63.4 (2009) 18

37 Pa. Code § 63.5 (2009) 18

37 Tex. Admin. Code § 145.2 (2009) 16, 17

Alaska Admin. Code 20.485 (2009) 18

Cal. Code Regs, tit. 15 § 2281 (2009) 16

Cal. Code Regs, tit. 15 § 2402 (2009) 16

Cal. Penal Code § 3041(a)(2005) 16

Ky. Rev. Stat. Ann. § 532.030 (2008) 16

Mich. Admin. Code r. 791.7715, 7716 (2009) 16

Mich. Comp. Laws § 791.223 16

Mich. Comp. Laws § 791.234 (2009) 16

Regs. Conn. State Agencies § 54-124a(j)(1)-5(g)
(2009) 18

R.I. Gen. Laws § 13-8-14 (2008) 16

Sup. Ct. R. 37.3 1

Sup. Ct. R. 37.6 1

Wash. Admin. Code § 381-70-160 (2009) 18

OTHER AUTHORITIES

ABA 2008 Report with Recommendation #105C 4

Br. Of the American Bar Ass'n. No. 03-633, *Roper v. Simmons* 3

Bruce Zucker, *A Triumph for Gideon: The Evolution of the Right to Counsel for California's Parolees in Parole Revocation Proceedings*, 33 W. St. U.L. Rev. 1 (2005-2006) 15

Human Rights Watch & Amnesty Int'l, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (2005) 12, 20, 21, 22

IJA/ABA *Juvenile Justice Standards* (1980) 2

IJA/ABA *Juvenile Justice Standards Relating to Transfer Between Courts* (1980) 4

Illinois Coalition for the Fair Sentencing of Children, *Categorically Less Culpable: Children Sentenced to Life Without Parole in Illinois* (2008) 21

MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, ISSUE BRIEF 3: "Less Guilty by Reason of Adolescence" 13

Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 Crim. Just. 27 (Summer 2000) 12

Michigan Dept. of Corrections, The Parole Consideration Process, http://www.michigan.gov/corrections/0,1607,7-119-1435-22909--,00.html 16

Office of Justice Programs, Dep't of Justice Characteristics of State Parole Supervising Agencies 17 (2006) 17

Samuel Gross, *et al.*, *Exonerations in the United States, 1989 through 2003*, 95 J. Crim. L. & Criminology 523 (2004) 12

The Convention for the Protection of Human Rights and Fundamental Freedoms, http://www.conventions.coe.int 21

United Nations Committee on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008) 22

United Nations Convention on the Rights of the Child G.A., Res. 61/146, ¶ 31(a), U.N. Doc. A/Res/61/146 (Dec. 19, 2006) 22

Youth in the Criminal Justice System: Guidelines for Policymakers and Practitionser (ABA 2001) 3

Wendy Heller, Note, *Poverty: The Most Challenging Condition of Prison Release*, 13 Geo. J. on Poverty & Pol'y 219 (2006) 18

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF THE PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA"), as *amicus curiae*, respectfully submits this brief to express its views on the question whether a sentence of life imprisonment without the possibility of parole for a juvenile offender is permissible under the Eighth and Fourteenth Amendments.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its more than 400,000 members span all 50 states and other jurisdictions, and include attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutor and public defender offices, as well as judges, legislators, law professors and law students.[2]

---

[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authorized this brief in whole or in part, and that no such counsel or party, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn

Since its inception, the ABA has taken an active role in advocating for the improvement of the criminal justice system, with special interest in the improvement of the juvenile justice system. The ABA includes many members who are judges, prosecutors, and defense attorneys with significant experience and special expertise in the treatment of juvenile offenders under the law.[3] The Juvenile Justice Committee of the ABA's Criminal Justice Section is composed of lawyers who specialize in juvenile justice issues.

In conjunction with the Institute of Judicial Administration ("IJA"), the ABA spent over nine years developing standards for the administration of juvenile justice, which culminated in the publication in 1980 of the IJA/ABA *Juvenile Justice Standards* (the "Standards") in 20 volumes. These Standards flowed from an exhaustive historical, legal and criminological study of society's response to juvenile crime. The Standards reflect the expertise and knowledge of trained legal practitioners in a number of disciplines and are informed by the experience of related professions that work with juvenile offenders.

In 1997, in response to growing number of state statutes and policies that allowed the

---

that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[3] As used in this brief, the term "juvenile" refers to individuals under the age of eighteen and "juvenile offender" refers to individuals who commit crimes or acts of delinquency while under the age of 18.

transfer of juvenile offenders to the adult criminal justice systems, the ABA created its Task Force on Youth in the Criminal Justice System. In 2001, this Task Force published its report, *Youth in the Criminal Justice System: Guidelines for Policymakers and Practitioners* (ABA 2001), in which the Task Force noted that, by 1997, the number of youths in adult prisons had reached 7,400 – double the number in adult prisons in 1985. *Id.* at 1. Further, the net result of these state policies was that, by 2001, at least 200,000 American juveniles were being tried as adults each year. *Id.*

The ABA drew upon this experience in its *amicus curiae* brief in *Roper v. Simmons*, 543 U.S. 551 (2005), in which this Court considered the constitutionality of the death penalty for juvenile offenders. In its brief, the ABA endorsed criminal justice policies, that accounted for factors unique to juveniles that affect their culpability, including the fact that juvenile offenders are less mature, less experienced, less able to exercise good judgment and self-restraint, more susceptible to environmental influence, and limited in their ability to assist in their own defense. Br. of the American Bar Ass'n, No. 03-633, *Roper v. Simmons at 2* http://www.abanet.org/amicus/briefs98-03.html (last visited July 21, 2009). In the view of the ABA:

> The ABA recognizes that some juvenile offenders deserve severe punishment for their crimes. However, when compared to adults, juvenile offenders' reduced capacity – in moral judgment, self restraint and the ability to resist the influence of others – renders them less

> responsible and less morally culpable than adults.

Id. at 3 (citing IJA/ABA *Juvenile Justice Standards Relating to Transfer Between Courts* at 3 (1980)).

Most recently, in February 2008, the ABA unanimously adopted policies addressing sentence mitigation for juvenile offenders.[4] *ABA 2008 Report with Recommendation #105C* at 2 (Policy adopted Feb. 2008) (the "Report").[5] As stated in the Report at 2, "The ABA's overall approach to juvenile justice policies has been and continues to be to strongly protect the rights of youthful offenders within all legal processes while insuring public safety."

As noted in the Report at 6, the ABA has opposed sentences of life without the possibility of parole for juvenile offenders since its adoption in 1991 of a policy endorsing the United Nations Convention on the Rights of the Child. Based on the ABA's long history of work in juvenile justice,

---

[4] The ABA's House of Delegates ("HOD"), with more than 500 delegates, is the ABA's policymaking body. Only recommendations adopted by the HOD become ABA policy. Recommendations may be submitted to the HOD by, among others, ABA delegates representing states and territories, state and local bar associations, affiliated organizations, ABA sections and divisions, ABA members and the Attorney General of the United States. *See* ABA General Information, *available at* http://www.abanet.org/leadership/delegates.html (last visited July 21, 2009).

[5] *Available at* http://www.abanet.org/leadership/2008/midyear/updated_reports/hundredfivec.doc. While only the Recommendation is approved by the HOD as ABA policy, the Report accompanying the Recommendation is instructive as to the considerations before the HOD.

the Report concluded that sentences for juvenile offenders must recognize that, no matter how adult-like their offenses, they are not adults. *Id.* at 6. That is, as this Court concluded in *Roper*, juvenile offenders have lesser culpability than adult offenders due to the typical behavioral characteristics inherent in adolescence. *Id.* (citing *Roper*, 543 U.S. at 569-70).

The ABA accordingly adopted as policy three principles: (1) sentences for juveniles should generally be less punitive than those for adults who have committed comparable offenses; (2) sentences for juveniles should recognize the key mitigating considerations particularly relevant to their youthful status, including those identified by the Court in *Roper*, 543 U.S. at 567-70, as well as the seriousness of the offense and the delinquent and criminal history of the juvenile; and (3) juveniles should generally be eligible for parole or other early release consideration at a reasonable point during their sentences and, if denied, should be reconsidered for parole or early release periodically thereafter.

These three principles, the ABA believes, are consistent with the Court's conclusions in *Roper* concerning the lesser culpability of juvenile offenders. The ABA believes that *Roper* and these principles are irreconcilable with a conclusion that a juvenile's life sentence is constitutionally permissible under the Eighth and Fourteenth Amendments when that sentence does not permit the possibility of parole.

SUMMARY OF ARGUMENT

The ABA respectfully submits that sentencing a juvenile offender to life in prison without the possibility of parole ("JLWOP") is not reconcilable with the lesser culpability of juvenile offenders. On that basis, settled doctrine establishes that such a sentence is not permissible under the Eighth and Fourteenth Amendments.

First, JLWOP should be considered a "grossly disproportionate" sentence because the "real time" of the juvenile offender's prison term, barring executive commutation, is the rest of the juvenile's life.

Second, "the evolving standards of decency," *Roper*, 543 U.S. at 561, citing *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958) (plurality opinion), have established that none of the standard justifications for criminal justice sentencing – retribution, deterrence, incapacitation and rehabilitation – are served by JLWOP.

Third, because the parole system provides sufficient safeguards to protect the public from those juvenile offenders who, as adults, are deemed to require continued imprisonment, JLWOP should not be permitted.

Finally, consideration of international authorities demonstrates an overwhelming opposition to JLWOP.

ARGUMENT

The ABA respectfully asserts that JLWOP cannot comport with this Court's conclusions in *Roper* concerning the lesser culpability of juvenile offenders, and therefore, should not be permissible under the Eighth and Fourteenth Amendments.

I. BASED ON THE REAL TIME THE JUVENILE OFFENDER IS LIKELY TO SPEND IN PRISON, JLWOP SHOULD BE CONSIDERED "GROSSLY DISPROPORTIONATE" UNDER THIS COURT'S JURISPRUDENCE.

Based on "the length of the prison term in real time, *i.e.*, the time that the offender is likely to actually spend in prison," *Ewing v. California*, 538 U.S. 11, 37 (2003) (Breyer, J., dissenting), JLWOP should be found to be "grossly disproportionate" under this Court's jurisprudence.

As this Court has stated, "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are grossly disproportionate to the crime." *Ewing*, 538 U.S. at 23 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (internal quotation marks and citation omitted)). As the *Ewing* Court stated, "'The Eighth Amendment . . . contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" *Id.* at 20 (quoting *Harmelin*, 501 U.S. at 997 (Kennedy, J., concurring in part and concurring in judgment)). The proportionality standard, further, has been applied "to terms of years in a series of

cases beginning with *Rummel v. Estelle,* [445 U.S. 263 (1980)]." *Id.* at 20.

"Real time" in the case of JLWOP is, by definition, the rest of the juvenile's life, barring executive commutation. In *Ewing,* an adult was sentenced to 25 years to life under California's "three strikes" law, under which there was a possibility of parole. In affirming the sentence, Justice O'Connor noted that "federal courts should be reluctant to review legislatively mandated terms of imprisonment, and that successful challenges to the proportionality of particular sentences should be exceedingly rare." *Ewing,* 538 U.S. at 22 (quoting *Hutto v. Davis,* 454 U.S. 370, 374 (1982) (per curiam)). Justice O'Connor then compared *Rummel,* in which the defendant had received life in prison with the possibility of parole, with *Solem v. Helm,* 463 U.S. 277 (1983), in which an adult was sentenced to life in prison without possibility of parole, but with the possibility of executive commutation.

Justice O'Connor stated that *Solem* had set out three factors that may be relevant in determining whether a sentence is so disproportionate that it violates the Eighth Amendment: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 22 (quoting *Solem,* 463 U.S. at 292).

However, as Justice Breyer noted in his dissent, "The one critical difference that explains the difference in outcome [in *Rummel* and *Solem*]

is the length of the likely prison term measured in real time." *Id.* at 39. That is, in *Rummel,* the defendant's sentence included the possibility of parole; in *Solem,* it did not. *See also, Ewing,* 538 U.S. at 22 (O'Connor, J.) (stating that the *Solem* Court had specifically noted the contrast between the *Solem* and *Rummel* sentences).

Although most juvenile offenders are not sentenced under recidivist statutes, the rationale for these statutes supports the conclusion that JLWOP should be found to be "grossly disproportionate." As stated in *Ewing*:

> In imposing a three strikes sentence, the State's interest is not merely punishing the offense of conviction, or the "triggering" offense: "[I]t is in addition the interest . . . in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law.

Id. at 29 (quoting *Rummel,* 445 U.S. at 276; *Solem* 463 U.S. at 296) (ellipsis original to *Ewing*).

The ABA asserts that if the difference in outcome in these cases was, in fact, the opportunity for parole for adult offenders "who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law," *Ewing,* 538 U.S. at 29, then juvenile offenders, regardless of the crime for which they are sentenced, should also be given a chance to show as adults in parole proceedings that their failure to conform was based on "youth and immaturity," *Roper,* 543 U.S. at 571.

While "federal courts should be reluctant to review legislatively mandated terms of imprisonment," *Ewing*, 538 U.S. at 22 (quoting *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam)), the ABA asserts that JLWOP is one category for which the challenge should be successful.

II. "THE EVOLVING STANDARDS OF DECENCY" HAVE ESTABLISHED THAT NONE OF THE STANDARD CRIMINAL JUSTICE SENTENCING THEORIES ARE SERVED BY JLWOP.

In *Roper*, in considering whether the imposition of the death sentence on a juvenile offender violated the Eighth Amendment's prohibition against "cruel and unusual punishments," this Court affirmed the propriety and necessity of referring to "'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." *Roper*, 543 U.S. at 560-61 (citing *Trop*, 356 U.S. at 100-01 (1958) (plurality opinion)).

The *Roper* Court concluded that there is "sufficient evidence that today our society views juveniles . . . as 'categorically less culpable than the average criminal.'" *Id.* at 567.[6] Because of the

---

[6] As the *Roper* Court stated, there are three general differences between juveniles and adults that demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders: (1) a lack of maturity and underdeveloped sense of responsibility; (2) vulnerability or susceptibility to negative influences and outside pressures, including peer pressure; and (3) the character of a juvenile is not as well formed as that of an adult. [footnote continued]

diminished capacity of juveniles, the Court concluded that "it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults." *Id.* at 571.

In the view of the ABA, the Court's analysis in *Roper* applies with equal force to JLWOP, which is now the most severe penalty that may be imposed on a juvenile.[7] Because the "signature qualities of youth are transient," *Roper*, 543 U.S. at 570, citing *Johnson v. Texas*, 509 U.S. 350, 368

The resulting "diminished culpability of juveniles" is therefore based on the conclusions that (1) their irresponsible conduct is not as morally reprehensible as that of an adult; (2) their vulnerability and lack of control over their immediate surroundings mean they have a greater claim than adults to be forgiven for failing to escape negative influences in their environment; and (3) their struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. As the *Roper* Court concluded:

> From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for the greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient: as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside."

Roper, 543 U.S. at 569-70 (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)).

[7] The ABA suggests that JLWOP also be reviewed as an evolving standard by considering (1) a review of objective indicia of consensus, and (2) the exercise of the Court's own independent judgment. *See Roper*, 543 U.S. at 564.

(1993), none of the standard penological goals – retribution, deterrence, incapacitation or rehabilitation – are served. *See also Harmelin,* 501 U.S. at 1023 (White, J., dissenting) ("To be constitutionally proportionate, punishment must be tailored to a defendant's personal responsibility and moral guilt") (citing *Enmund v. Florida,* 458 U.S. 782, 801 (1982)).[8] *See also Harmelin*, 501 U.S. at 1023 (White, J., dissenting) ("To be

---

[8] In considering a juvenile offender's personal responsibility and moral guilt, the ABA asserts that the following should also be considered:

- Juveniles are more susceptible to coercion and more likely to be intimidated into making false confessions than are adults. Samuel Gross, *et al., Exonerations in the United States, 1989 through 2003*, 95 J. Crim. L. & Criminology 523, 545 (2004) (concluding that 42% of the juveniles convicted during that period of time had falsely confessed to crimes they did not commit).

- Juveniles are generally less capable than adults of communicating with and giving meaningful assistance to their counsel; their lack of appreciation of long-term consequences impairs their ability to make appropriate decisions regarding plea bargains and other aspects of their legal strategy; and they lack the basic skills to assist them in identifying exculpatory facts and effectively communicating them to their counsel. Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 Crim. Just. 27, 28 (Summer 2000).

- In eleven out of the seventeen years between 1985 and 2001, juveniles convicted of murder in the United States were more likely to receive sentences of life in prison without possibility of parole than were adults. United States. Human Rights Watch & Amnesty Int'l, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, at 2 (2005) (http://www.amnestyusa.org/countries/usa/clwop/report.pdf) (last visited July 19, 2009). Further, minority juveniles are far more likely to be sentenced to life without possibility of parole than their non-minority counterparts. *Id.*

constitutionally proportionate, punishment must be tailored to a defendant's personal responsibility and moral guilt") (citing *Enmund v. Florida*, 458 U.S. 782, 801 (1982)).

As the *Roper* Court stated, "Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571.

As for deterrence, the *Roper* Court stated, "In general we leave to legislatures the assessment of the efficacy of various criminal penalty schemes. . . . Here, however, the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Id.* at 571, citing *Harmelin v. Michigan*, 501 U.S. 957, 998-99 (1991) (Kennedy, J. concurring).[9]

---

[9] Although the *Roper* Court noted that, to the extent the juvenile death penalty might have a residual deterrent effect, JLWOP "is itself a severe sanction, in particular for a young person," *id.* at 572, studies indicate that there appears to be no significant difference in deterrence between a juvenile death penalty and JLWOP. See, e.g., MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, ISSUE BRIEF 3: "Less Guilty by Reason of Adolescence," *available at* http://www.adjj.org/downloads/6093issue_brief_3.pdf (last visited July 19, 2009) (concluding that juveniles' "lack of foresight, along with their tendency to pay more attention to immediate gratification than to long-term consequences, are among the factors that may lead them to make bad decisions").

The penological goal of incapacitation, to be sure, may be served when it is determined that a juvenile may be a threat to society. However, because "the signature qualities of youth are transient," *Roper*, 543 U.S. at 570, citing *Johnson v. Texas*, 509 U.S. 350, 368 (1993), this does not support the juvenile's continued incapacitation throughout adulthood and into old age without an opportunity for reevaluation. *See Roper*, 543 U.S. at 573 ("It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption").

Finally, JLWOP is not supported by the penological goal of rehabilitation. The objective of rehabilitation is to return the offender to society. Return is, by definition, not possible under JLWOP. Further, as stated by Justice Marshall in his dissent in *Harmelin*, 501 U.S. at 1028:

> Because [a mandatory sentence of life imprisonment without the possibility of parole] does not even purport to serve a rehabilitative function, the sentence must rest on a rational determination that the punished 'criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator.'

Id. (quoting *Furman v. Georgia*, 408 U.S. 238, 307 (1972) (Stewart, J., concurring)).

"A legitimate punishment must further at least one of these goals." *Ewing*, 538 U.S. at 25; *Harmelin*, 501 U.S at 999 (Kennedy, J., concurring

in part and concurring in judgment). This is because, as stated in *Coker v. Georgia*, 433 U.S. 584, 592 (1977), the Eighth Amendment bars punishment that "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." JLWOP fails on both counts.

III. NEITHER THE PUBLIC SAFETY NOR PENAL OBJECTIVES WOULD BE COMPROMISED BY PERMITTING THE OPPORTUNITY FOR PAROLE.

Because the parole process has safeguards to protect the public, as well as recognized law enforcement and rehabilitative functions, neither the safety of society nor the objectives of the penal system would be compromised by permitting juvenile offenders the opportunity to be considered for parole.

As this Court and commentators have recognized, the parole system includes significant rehabilitative, law enforcement and cost control functions. *E.g. Greenholtz v. Inmates of the Nebraska Penal and Corr. Complex*, 442 U.S. 1, 13 (1979) (the "ultimate purpose of parole . . . is a component of the long-range objective of rehabilitation"); *PA Bd. of Prob. and Parole v. Scott*, 524 U.S. 357, 367 (1998) (explaining that "one of the purposes of parole is to reduce the costs of criminal punishment while maintaining a degree of supervision over the parolee"). *See also*, Bruce Zucker, *A Triumph for Gideon: The Evolution of the Right to Counsel for California's Parolees in Parole*

Revocation Proceedings, 33 W. St. U. L. Rev. 1, 3 (2005-2006) (explaining that parole also protects society through restrictions, reintegration services and by encouraging inmates to "conform their behavior while incarcerated under the threat of delaying or forfeiting early release from custody").

Moreover, the possibility of parole would not require the release of violent offenders considered a risk to the community. Parole involves significant checks to protect the public. Years may pass before an offender becomes eligible for parole consideration.[10] Parole boards consider a variety of factors in making parole recommendations, including the seriousness of the offense, the sentence length, the amount of time served, the offender's age, criminal history and prison behavior; participation in prison-based educational, vocational or rehabilitation programs; counseling reports, psychological evaluations, and the viability of parole plans, including where and how the inmate would live and support himself if released.[11] Generally, a majority of parole board panels must approve parole, and some states have imposed more stringent approval requirements for certain offenders.[12] Most inmates eligible for

---

[10] *See, e.g.*, Ky. Rev. Stat. Ann. § 532.030 (2008); Mich. Comp. Laws § 791.234 (2009).

[11] *See, e.g.*, Cal. Penal Code § 3041(a) (2005); Cal. Code Regs, tit. 15 § 2281 (2009); Cal. Code Regs titl. 15 § 2402 (2009); Mich. Comp. Laws § 791.223; Mich. Admin. Code r. 791.7715, 7716 (2009); 37 Tex. Admin. Code § 145.2 (2009); R.I. Gen. Laws § 13-8-14 (2008).

[12] *See, e.g.*, Michigan Dept. of Corrections, The Parole Consideration Process, http://www.michigan.gov/corrections/0,1607,7-119-1435-22909--,00.html (last visited July 17, 2009)

parole consideration are not, in fact, granted parole.[13] Offenders whose requests for parole are rejected must wait a certain period of time, sometimes years, before they can be considered again.[14] Some states authorize the governor to reverse a decision granting parole, or impose delays or additional conditions on the terms of parole as an additional check to ensure that public safety is not compromised.[15]

Offenders granted parole are not released unconditionally. Rather, states impose conditions and restrictions on parolees. States may require the offenders to complete in-prison rehabilitation programs before releasing them on parole.[16] Once

---

(explaining that decisions for Michigan prisoners serving life sentences must be made by a majority of all ten members of the Parole Board, rather than a majority of the three member panel considering parole for other offenders).

[13] *See* Office of Justice Programs, Dep't of Justice, Characteristics of State Parole Supervising Agencies (2006), http://www.ojp.usdoj.gov/bjs/pub/pdf/cspsa06.pdf (last visited July 20, 2009) (reporting 54% of adult parole inmates in 15 states were denied request for release on parole).

[14] Massachusetts, for example, provides that if parole is not granted at the initial parole release hearing, a parole review hearing occurs for most inmates annually thereafter, except where parole board members act to cause a review at an earlier time. Offenders sentenced as habitual criminals, committed as sexually dangerous persons or serving life sentences require subsequent hearings 2, 3 and 5 years, respectively, after the initial parole release hearing. 120 CMR 301.01 (2009).

[15] *See, e.g.*, http://www.cdcr.ca/gov/Parole/Life_Parole_Process/Index.html (last visited, July 21, 2009).

[16] *See, e.g.*, 37 Tex. Admin. Code § 145.2 (2009).

released, offenders may be confined to their homes with electronic monitoring and are typically restricted by any number of conditions, including drug counseling, treatment and testing requirements, restrictions on travel and on contact with certain persons, required regular contact with parole officers, payment of fines and restitution, and restrictions on the possession of firearms and other criminal behavior.[17]

Further, parole boards retain the right to revoke parole for the violation of any condition imposed, and many parole revocations result not from the commission of another crime, but from a failure to comply with a procedural requirement.[18] When offenders violate the conditions of their parole, the trier of fact generally will not apply the 'beyond a reasonable doubt' standard applied at the trial level; rather, the standard of proof employed in violation of parole hearings ranges from "clear and convincing evidence" to "probable cause," with most states using the "preponderance of the evidence" standard.[19] Moreover, "[i]n a revocation hearing . . . formal procedures and rules of

---

[17] *See* 37 Pa. Code § 63.4 (2009); 37 Pa. Code § 63.5 (2009); 220 Ind. Admin. Code 1.1-3-1 – 1.1-3-10 (2009).

[18] *See generally*, Wendy Heller, Note, *Poverty: The Most Challenging Condition of Prison Release*, 13 Geo. J. on Poverty & Pol'y 219 (Summer 2006).

[19] *See* 22 Alaska Admin. Code 20.485 (2009) (preponderance of the evidence standard sufficient to authorize decision to revoke parole); Wash. Admin. Code § 381-70-160 (2009) (same); Regs. Conn. State Agencies § 54-124a(j)(1)-5(g) (2009) (hearing examiner's finding on parole violation based on probable cause standard sufficient to order detention pending final revocation hearing).

evidence are not employed." *Gagnon v. Scarpelli*, 411 U.S. 778, 789 (1973). Therefore, a state's ability to revoke parole based on even a procedural violation of parole conditions often is far easier, and requires a far lower burden of proof, than an adjudication on the underlying offense.

In contrast, for JLWOP sentences, the juvenile offenders will spend their lives in prison without having the opportunity to even be considered for parole. The ABA is not asserting that all juveniles serving JLWOP sentences will establish, at some point in their sentence, that they are entitled to parole. The ABA is asserting, however, that they should not be denied that opportunity.

It is undeniable that some juvenile offenders commit heinous crimes. However, as the *Roper* Court stated, "An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." 543 U.S. at 573.

For the same reasons, the ABA submits that the courts and juries should not be permitted to impose JLWOP. Rather, the decision as to the appropriateness – or inappropriateness – of parole for juvenile offenders should be made at reasonable points in their sentences, based on the adults they have become.

IV. REVIEW OF INTERNATIONAL AUTHORITIES DEMONSTRATES OVERWHELMING OPPOSITION TO JLWOP.

The *Roper* Court stated that its conclusion that the juvenile death penalty was a disproportionate sentence found "confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty." *Id.* at 575. The Court noted that, while this was not controlling, the Court had referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." *Id.* (citing *Trop*, 356 U.S. at 102-03 (plurality opinion)).

Similarly, if the Court chooses to consider the laws of other countries and international authorities concerning JLWOP, the review will demonstrate an overwhelming opposition to JLWOP.

For example, as of 2005, only thirteen countries outside the United States had laws that theoretically permitted such a sentence, and there were perhaps only a dozen individuals serving sentences of JLWOP in three countries outside of the United States. Human Rights Watch & Amnesty Int'l, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, at 5 (2005) (hereinafter, "Human Rights Watch Report"). The numbers have continued to decline, as some of those countries have changed their laws and practices in the past three years to either

abolish the sentence or permit some review of an imposed sentence. Connie De La Vega and Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 Univ. S.F. L. Rev. 983, 1004-05 (Aug. 11, 2008) ("De La Vega and Leighton"); Illinois Coalition for the Fair Sentencing of Children, *Categorically Less Culpable: Children Sentenced to Life Without Parole in Illinois* (2008).

Further, the Convention on the Rights of the Child ("CRC") prohibits both the juvenile death penalty and JLWOP. Human Rights Watch Report at 98 (2005) (citing CRC, art. 37(a)). The CRC also requires states to consider "the desirability of promoting the child's reintegration and the child's assuming a constructive role in society." *Id.* (citing CRC, art. 40.1). As of 2005, 192 out of 194 countries were parties; the United States and Somalia are the two countries that have not ratified the CRC, although both have signed it. *Id.* at 99.

Moreover, in 1996, the European Court of Human Rights declared JLWOP illegal under Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which forbids "inhuman or degrading treatment or punishment." *Hussain v. United Kingdom*, 22 EHRR 1, ¶ 53 (1996) (citing *The Convention for the Protection of Human Rights and Fundamental Freedoms*[20]). The *Hussain* decision is binding on the forty-seven European nations that have signed and ratified the convention.

---

[20] *Available at* http://www.conventions.coe.int.

In April 2004, the Commission on Human Rights adopted a resolution which urged states to abolish JLWOP. *See* Human Rights Watch Report at 107 (2005).

In December 2006, the United Nations General Assembly, by a vote of 185 to one (the United States being the lone opposition vote) passed a resolution calling upon nations to abolish the juvenile death penalty and JLWOP. De La Vega and Leighton at 1012 (citing Rights of the Child, G.A., Res. 61/146, ¶ 31(a), U.N. Doc. A/Res/61/146 (Dec. 19, 2006)).

Finally, just last year, the United Nations Committee on the Elimination of Racial Discrimination, to which the United States is a party, determined that the racially disproportionate impact of JLWOP in the United States warranted recommending abolishing the sentence. U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008); De La Vega and Leighton at 1012.

As this Court concluded in *Roper*, "It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." 543 U.S. at 578.

CONCLUSION

For the reasons stated above, *amicus curiae* the American Bar Association requests that the judgments of the District Court of Appeals of Florida, First District be reversed.

Respectfully submitted,

H. THOMAS WELLS, JR.
Counsel of Record
PRESIDENT
AMERICAN BAR ASSOCIATION
321 N. CLARK STREET
CHICAGO, IL 60654
(312) 988-5000

Of Counsel:
Lawrence A. Wojcik
Kenneth L. Schmetterer
Ann Marie Bredin

Counsel for Amicus Curiae
American Bar Association

July 23, 2009

AMICUS CURIAE BRIEF

134

Nos. 08-7412, 08-7621

Supreme Court, U.S.
FILED
JUL 23 2009
OFFICE OF THE CLERK

IN THE

United States Supreme Court

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

(Additional Caption On the Reverse)

On Writ of Certiorari to the District Court of Appeal of Florida, First District

BRIEF FOR THE AMERICAN MEDICAL ASSOCIATION AND THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

Khai LeQuang
ORRICK, HERRINGTON
& SUTCLIFFE LLP
777 South Figueroa Street,
Suite 3200
Los Angeles,
California 90017-5855
213-629-2020

E. Joshua Rosenkranz
Counsel of Record
Gregory S. Schwegmann
ORRICK, HERRINGTON
& SUTCLIFFE LLP
666 Fifth Avenue
New York,
New York 10103-0001
212-506-5000

Counsel for Amici Curiae

July 23, 2009

TC+TA
005 4V20RH

973 8

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

QUESTION PRESENTED

Whether the Eighth Amendment's ban on cruel and unusual punishment prohibits the imprisonment of a juvenile for life without the possibility of parole as punishment for the juvenile's commission of a non-homicide offense.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CITED AUTHORITIES iii

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

THE STRUCTURAL AND FUNCTIONAL IMMATURITIES OF THE ADOLESCENT BRAIN PROVIDE A BIOLOGICAL BASIS FOR THE BEHAVIORAL IMMATURITIES EXHIBITED BY ADOLESCENTS. 4

A. Adolescents Are Less Able Than Adults to Voluntarily Control Their Behavior. 5

B. Recent Studies of the Brain Have Established a Biological Basis for the Observed Immaturities in Adolescent Behavior. 13

1. Adolescent Brains Are Structurally Immature in Areas of the Brain Associated With Enhanced Abilities of Executive Behavior Control. 16

2. Adolescent Brains Tend to Be More Active Than Adult Brains in Regions Associated With Risky, Impulsive, and Sensation-Seeking Behavior and Less Active in Regions Associated With the Ability to Voluntarily Control Behavior. 24

TABLE OF CONTENTS

Page

CONCLUSION 31

TABLE OF CITED AUTHORITIES

Pages

Scientific Authorities

Adolphs, Ralph et al., *Fear and the Human Amygdala*, 15 J. NEUROSCI. 5879 (1995).....26, 28

Adolphs, Ralph, *Neural Systems for Recognizing Emotion*, 12 CURRENT OPINION IN NEUROBIO. 169 (2002) 26

Adolphs, Ralph, *The Human Amygdala and Emotion*, 5 NEUROSCIENTIST 125 (1999).....27

Andersen, Susan L., *Trajectories Of Brain Development: Point of Vulnerability or Window of Opportunity?* 27 NEUROSCI. AND BIOBEHAV. REVS 3 (2003) 8, 29

Anderson, Steve W. et al., *Impairment of Social and Moral Behavior Related to Early Damage in Human Prefrontal Cortex*, 2 NATURE NEUROSCI. 1032 (1999).....17

Antoine, Florence, *Cooperative Group Evaluating Diagnostic Imaging Techniques*, 81 J. NAT'L CANCER INST. 1347 (1989).....13

Cited Authorities

Pages

Baird, Abigail A. et al., *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1 (1999) 27

Barnes, Kelly Anne et al., *Developmental Differences in Cognitive Control of Socio-Affective Processing*, 32:3 DEVELOPMENTAL NEUROPSYCHOL. 787 (2007) 10

Beauregard, Mario et al., *Neural Correlates of Conscious Self-Regulation of Emotion*, 21 J. NEUROSCI. 165RC (2001) 27

Bechara, Antoine et al., *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 BRAIN 2189 (2000) 17

Bechara, Antoine et al., *Dissociation of Working Memory From Decision Making Within the Human Prefrontal Cortex*, 18 J. NEUROSCI. 428 (1998) 17

Blakemore, S. J., *Adolescent Development of the Neural Circuitry for Thinking About Intentions*, 2:2 SOC. COGNITIVE & AFFECTIVE NEUROSCI. 130 (2007) 24

Cited Authorities

Pages

Breiter, Hans C. et al., *Response and Habituation of the Human Amygdala During Visual Processing of Facial Expression*, 17 NEURON 875 (1996) 26

Bunge, Silvia A. et al., *Immature Frontal Lobe Contributions to Cognitive Control in Children: Evidence from fMRI*, 33 NEURON 301 (2002) 16

Burnett, Stephanie et al., *Development During Adolescence of the Neural Processing of Social Emotion*, 21:9 J. COGNITIVE NEUROSCI. 173 (2009) 24

Casey, B. J. et al., *Contribution of Frontostriatal Fiber Tracts to Cognitive Control in Parent–Child Dyads With ADHD*, 164:11 AM. J. PSYCHIATRY 1729 (2007) 25

Casey, B. J. et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOL. 241 (2000) 16, 18

Casey, B. J. et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62 (2008) .....*passim*

Cited Authorities

Pages

Cauffman, Elizabeth & Shulman, Elizabeth, *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, DEVELOPMENTAL PSYCHOL. (forthcoming 2009) 8

Cauffman, Elizabeth & Steinberg, Lawrence, *(Im)Maturity of Judgment in Adolescences: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741 (2000).....6, 12

Chambers, Andrew R., Taylor, Jane R. & Potenza, Marc N., *Developmental Neurocircuitry of Motivation in Adolescence: A Critical Period of Addiction Vulnerability*, 160 AM. J. PSYCHIATRY 1041 (2003).....29

Crews, Fulton, He, Jun & Hodge, Clyde, *Adolescent Cortical Development: A Critical Period of Vulnerability for Addiction*, 86 PHARMACOLOGY BIOCHEMISTRY AND BEHAV. 189 (2007).....8, 29

Crone, Eveline A. et al., *Neurocognitive Development of Relational Reasoning*, 12:1 DEVELOPMENTAL SCI. 55 (2009).....16

Cited Authorities

Pages

Dias, R. et al., *Dissociable Forms of Inhibitory Control Within Prefrontal Cortex With an Analog of the Wisconsin Card Sort Test: Restriction to Novel Situations and Independence From "On-Line" Processing*, 17 J. NEUROSCI. 9285 (1997) 16

Durston, Sarah et al., *Anatomical MRI of the Developing Human Brain: What Have We Learned?* 40 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1012 (2001) 13, 18, 22

Durston, Sarah & Casey, B. J., *What Have We Learned About Cognitive Development from Neuroimaging?*, 44 NEUROPSYCHOLOGIA 2149 (2006) 5

Elliott, R. et al., *Differential Neural Response to Positive and Negative Feedback in Planning and Guessing Tasks*, 35 NEUROPSYCHOLOGIA 1395 (1997) 17

Ernst, Monique et al., *Neurobiology of the Development of Motivated Behaviors in Adolescence: A Window into a Neural Systems Model*, 93 PHARMACOLOGY, BIOCHEMISTRY & BEHAV. 199 (2009) 26

Ernst, Monique et al., *Triadic Model of the Neurobiology of Motivated Behavior in Adolescence*, 36 PSYCHOL. Med. 299 (2006) 30

Cited Authorities

Pages

Eshel, Neir et al., *Neural Substrates of Choice in Adults and Adolescents: Development of the Ventrolateral Prefrontal and Anterior Cingulate Cortices*, 45 NEUROPSYCHOLOGIA 1270 (2007) 28

Fair, Damien A. et al., *Development of Distinct Control Networks Through Segregation and Integration*, 104 PROC. NAT'L ACAD. SCI. U.S. 13507 (2007) 23

Furby, Lita & Beyth-Maron, Ruth, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1 (1992) 12

Galvan, Adriana et al., *Earlier Development of the Accumbens Relative to Orbitofrontal Cortex Might Underlie Risk-Taking Behavior in Adolescents*, 26:25 J. NEUROSCI. 6885 (2006) 25, 28

Gardner, William, *A Life-Span Rational-Choice Theory of Risk Taking, in* ADOLESCENT AND ADULT RISK TAKING: THE EIGHTH TEXAS TECH SYMPOSIUM ON INTERFACES IN PSYCHOLOGY (N. Bell & R. Bell eds., 1993) 6

Pages

Gazzaniga, Michael S. et al., COGNITIVE NEUROSCIENCE: THE BIOLOGY OF THE MIND (2d ed. 2002) ..... *passim*

Giedd, Jay N. et al., *Anatomical Brain Magnetic Resonance Imaging of Typically Developing Children and Adolescents*, 48:5 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 465 (2009) 18, 23, 27

Giedd, Jay N. et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCI. 861 (1999) 15, 17, 20

Giedd, Jay N., *The Teen Brain: Insights from Neuroimaging*, 42 J. ADOLESCENT HEALTH 335 (2008) 20

Gläscher, Jan & Adolphs, Ralph, *Processing of the Arousal of Subliminal and Supraliminal Emotional Stimuli by the Human Amygdala*, 23 J. NEUROSCI. 10274 (2003) 26

Gogtay, Nitin et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174 (2004) ..... *passim*

Cited Authorities

Pages

Goldberg, Elkhonon, THE EXECUTIVE BRAIN: FRONTAL LOBES & THE CIVILIZED MIND (Oxford Univ. Press, 2001) 21, 26, 27

Hare, Todd A. et al., *Biolgical Substrates of Emotional Reactivity and Regulation in Adolescence During an Emotional Go-Nogo Task*, 63:10 BIOLOGICAL PSYCHIATRY 927 (2008).....25

Hariri, Amhad et al., *Modulating Emotional Responses: Effects of a Neocortical Network on the Limbic System*, 11 NEUROREPORT 43 (2000).....27

Huttenlocher, Peter R., *Synaptic Density in Human Frontal Cortex: Developmental Changes and Effects of Aging*, 163 BRAIN RES. 195 (1979) 19

Kandel, Eric R. et al., PRINCIPLES OF NEURAL SCIENCE (James H. Schwartz & Thomas M. Jessel, eds., McGraw-Hill 2000).....18

Kennedy, David N. et al., *Basic Principles of MRI and Morphometry Studies of Human Brain Development*, 5 DEVELOPMENTAL SCI. 268 (2002) 20

Cited Authorities

Pages

Killgore, William D.S. & Yurgelun-Todd, Deborah, *Activation of the Amygdala and Anterior Cingulate During Nonconscious Processing of Sad Versus Happy Faces*, 21 NEUROIMAGE 1215 (2004) 27

Kim, Sang Hee & Hamann, Stephan, *Neural Correlates of Positive and Negative Emotion Regulation*, 19:5 J. COGNITIVE NEUROSCI. 776 (2007) 10

Krain, Amy L. et al., *An fMRI Examination of Developmental Differences in the Neural Correlates of Uncertainty and Decision Making*, 47:10 J. CHILD PSYCHOL. & PSYCHIATRY 1023 (2006) 25

LaBar, Kevin S. et al., *Human Amygdala Activation During Conditioned Fear Acquisition and Extinction: A Mixed-Trial fMRI Study*, 20 NEURON 937 (1998).....26

Lane, Richard D. et al., *Neuroanatomical Correlates of Pleasant and Unpleasant Emotion*, 35 NEUROPSYCHOLOGIA 1437 (1997).....26

Langleben, D. D. et al., *Brain Activity During Simulated Deception: An Event-Related Functional Magnetic Resonance Study*, 15 NEUROIMAGE 727 (2002).....17

Cited Authorities

Pages

LeDoux, Joseph, THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE (1996).....27

Lenroot, R. K. & Giedd, Jay N., *Brain Development in Children And Adolescents: Insights from Anatomical Magnetic Resonance Imaging*, 30 NEUROSCI. & BEHAV. REVS. 718 (2006) 6

Luna, B. & Sweeney, J. A., *The Emergence of Collaborative Brain Function: fMRI Studies of the Development of Response Inhibition*, 1021 ANNALS N.Y. ACAD. SCI. 296 (2004).....23

Luna, Beatrice, *The Maturation of Cognitive Control and the Adolescent Brain, in* FROM ATTENTION TO GOAL-DIRECTED BEHAVIOR (Francisco Aboitiz and Diego Cosmelli eds., Springer Berlin Heidelberg 2009).....*passim*

Manes, Facundo et al., *Decision-Making Processes Following Damage to the Prefrontal Cortex*, 125 BRAIN 624 (2002) 16

McGivern, Robert F. et al., *Cognitive Efficiency on a Match to Sample Task Decreases at the Onset of Puberty in Children*, 50 BRAIN & COGNITION 73 (2002)..19, 20

Pages

Moll, Jorge et al., *Frontopolar and Anterior Temporal Cortex Activation in a Moral Judgment Task: Preliminary Functional MRI Results in Normal Subjects*, 59 ARQ NEUROPSIQUIATR 657 (2001).....17

Muetzel, Ryan L. et al., *The Development of Corpus Callosum Microstructure and Associations With Bimanual Task Performance in Healthy Adolescents*, 39:4 NEUROIMAGE 1918 (2008).....30

Nagy, Zoltan, Westerberg, Helena & Klingberg, Torkel, *Maturation of White Matter is Associated with the Development of Cognitive Functions During Childhood*, 16:7 J. COGNITIVE NEUROSCI. 1227 (2004)21, 22, 24

O'Doherty, J. et al., *Abstract Reward and Punishment Representations in the Human Orbitofrontal Cortex*, 4 NATURE NEUROSCI. 95 (2001).....16

Olson, Elizabeth A., *Delay and Probability Discounting Behavior in Healthy Adolescents: Associations With Age, Personality Style, and Other Measures of Executive Function*, 43:7 PERSONALITY AND INDIVIDUAL DIFFERENCES 1886 (2007).....30

Cited Authorities

Pages

Olson, Elizabeth A., *White Matter Integrity Predicts Delay Discounting Behavior In Adolescents: A Diffusion Tensor Imaging Study*, 21:7 J. COGNITIVE NEUROSCI. 1406 (2008) 30

Paus, Tomas et al., *Structural Maturation of Neural Pathways in Children and Adolescents: In Vivo Study*, 283 SCI. 1908 (1999) 21

Pfefferbaum, Adolf et al., *A Quantitative Magnetic Resonance Imaging Study of Changes in Brain Morphology from Infancy to Late Adulthood*, 51 ARCHIVES OF NEUROLOGY 874 (1994) 22

Phan, K. Luan et al., *Functional Neuroanatomy of Emotion: A Meta-Analysis of Emotion Activation Studies in PET and fMRI*, 16 NEUROIMAGE 331, 336 (2002) 26, 27

Rogers, Robert D. et al., *Choosing Between Small, Likely Rewards and Large, Unlikely Rewards Activates Inferior and Orbital Prefrontal Cortex*, 20 J. NEUROSCI. 9029 (1999) 16

Pages

Rosso, Isabelle M. et al., *Cognitive and Emotional Components of Frontal Lobe Functioning in Childhood and Adolescence*, 1021 ANNALS N.Y. ACAD. SCI. 355 (2004) 10, 16

Rubia, K. et al., *Functional Frontalisation with Age: Mapping Neurodevelopmental Trajectories with fMRI*, 24 NEUROSCI. & BIOBEHAV. REVS. 13 (2000) 22

Siegel, Daniel J., THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE (Guilford Press 1999) 19

Sowell, Elizabeth R. et al., *Development of Cortical and Subcortical Brain Structures in Childhood and Adolescence: A Structural MRI Study*, 44 DEVELOPMENTAL MED. & CHILD NEUROLOGY 4 (2002) 14, 19

Sowell, Elizabeth R. et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCI. 859 (1999) 15, 17, 18, 22

Cited Authorities

Pages

Sowell, Elizabeth R. et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. NEUROSCI. 8819 (2001) 14, 17, 21

Sowell, Elizabeth R. et al., *Mapping Cortical Change Across the Human Life Span*, 6 J. NEUROSCI. 8819 (2001) 15, 18, 21, 22

Spear, Linda Patia, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCI. & BIOBEHAV. REVS. 417 (2000) ..*passim*

Steinberg, Laurence & Monahan, Kathryn C., *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCHOL. 1531 (2007).....9, 11

Steinberg, Laurence & Scott, Elizabeth S., *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009 (2003).....12

Steinberg, Laurence, *Adolescent Development and Juvenile Justice*, 16:3 ANN. REV. CLINICAL PSYCHOL. 47 (2009) .....*passim*

Pages

Steinberg, Lawrence et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28 (2009) 6, 9, 27

Steinberg, Lawrence et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence of a Dual Systems Model*, 44:6 DEVELOPMENTAL PSYCHOL. 1774 (2008) 5, 8, 9

Stevens, Michael C. et al., *Functional Neural Networks Underlying Response Inhibition in Adolescents and Adults*, 181 BEHAV. BRAIN RESEARCH 12 (2007) 21

Talukder, Gargi, *Decision-Making is Still a Work in Progress for Teenagers*, July 2000, http://www.brainconnection.com 28

Towbin, Kenneth E. & Schowalter, John E., *Adolescent Development, in* PSYCHIATRY (Allan Tasman ed., 2d ed. 2003) 18, 22

Watts, Liston C. et al., *Frontostriatal Microstructure Predicts Individual Differences in Cognitive Control*, 16:4 CEREBRAL CORTEX 553 (2006) 25

Cited Authorities

Pages

Wright, Samantha B. et al., *Neural Correlates of Fluid Reasoning in Children and Adults*, 1:8 FRONTIERS HUMAN NEUROSCI. 7 (2008) 17

Yurgelun-Todd, Deborah, *Emotional and Cognitive Changes During Adolescence*, 17 CURRENT OPINION IN NEUROBIOLOGY 251 (2007) 6, 14, 16, 21

INTERESTS OF AMICI CURIAE*

The American Medical Association. With approximately 240,000 members, the American Medical Association is the nation's largest professional organization of physicians and medical students. Founded in 1847, its purpose is to promote the science and art of medicine and the betterment of public health.

The American Academy of Child and Adolescent Psychiatry. Founded in 1953, the American Academy of Child and Adolescent Psychiatry (the "AACAP") is comprised of over 7,500 child and adolescent psychiatrists and other interested physicians. Consistent with the focus of the juvenile court system on rehabilitation rather than retribution and multiple international treaties, including the UN Convention of Rights of the Child, the AACAP has adopted a policy statement strongly opposing the imposition of a sentence of life without the possibility of parole for crimes committed as juveniles. AACAP Policy Statement, June 2009, *available at* http://www.aacap.org/cs/root/policy_statements/life_without_parole_for_juvenile_offenders.

---

* The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), letters consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Each of the above-referenced *amici* is committed to the advancement of science. While not taking a formal position on whether sentencing a juvenile to a term of imprisonment of life without the possibility of parole violates the protections provided by the Eighth Amendment of the U.S. Constitution, *amici* submit this brief to describe the scientific findings of medical, psychiatric, and psychological research relevant to this issue.

SUMMARY OF ARGUMENT

The adolescent's mind works differently from ours. Parents know it. This Court has said it. Legislatures all over the world have presumed it for decades or more. And scientific evidence now sheds light on how and why adolescent behavior differs from adult behavior.

The differences in behavior have been documented by scientists along several dimensions. Scientists have found that adolescents as a group, even at later stages of adolescence, are more likely than adults to engage in risky, impulsive, and sensation-seeking behavior. This is, in part, because they overvalue short-term benefits and rewards, are less capable of controlling their impulses, and are more easily distracted from their goals. Adolescents are also more emotionally volatile and susceptible to stress and peer influences. In short, the average adolescent cannot be expected to act with the same control or foresight as a mature adult.

Behavioral scientists have observed these differences for some time, but only recently have studies provided an understanding of the biological underpinnings for why adolescents act the way they do. For example, brain imaging studies reveal that adolescents generally exhibit more neural activity than adults or children in areas of the brain that promote risky and reward-based behavior. These studies also demonstrate that the brain continues to mature, both structurally and functionally, throughout adolescence in regions of the brain responsible for controlling thoughts, actions, and emotions.

While science cannot gauge moral culpability, scientists can shed light on some of the measurable attributes that the law has long treated as highly relevant to culpability and the appropriateness of punishment. This brief focuses on what science can tell us about the neurological, physiological, psychological, emotional, and behavioral development of adolescents from the perspective of researchers and medical professionals.

ARGUMENT

THE STRUCTURAL AND FUNCTIONAL IMMATURITIES OF THE ADOLESCENT BRAIN PROVIDE A BIOLOGICAL BASIS FOR THE BEHAVIORAL IMMATURITIES EXHIBITED BY ADOLESCENTS.

Although adolescents[1] can, and on occasion do, exhibit adult levels of judgment and control, their ability to do so is limited and unreliable compared to that of adults. Adolescents, as a group, are less capable than adults of accurately assessing risks and rewards; controlling their impulses; and recognizing and regulating emotional responses — in short, they are less consistent in their ability to self-regulate their behavior. *See* Point A, *infra*.

Moreover, recent advances in brain-imaging technology confirm that the very regions of the brain that are associated with voluntary behavior control and regulation of emotional response and impulsivity are structurally immature during adolescence. Studies have also revealed that these structural immaturities are consistent with age-related differences in both brain function and behavior. *See* Point B, *infra*.

---

[1] There is a continuum of differences in brain maturation and cognitive abilities between the youngest and oldest of adolescents. All of the scientific conclusions recounted in this brief, however, are applicable to adolescents as a class—ranging from ages 12 to 17.

A. Adolescents Are Less Able Than Adults to Voluntarily Control Their Behavior.

Numerous studies of adolescent behavior over the last two decades confirm the stereotype that adolescents, as a group, are prone to making impulsive or reactive judgments. "Relative to individuals at other ages, . . . adolescents . . . exhibit a disproportionate amount of reckless behavior, sensation seeking and risk taking."[2] Sensation-seeking peaks during adolescence across cultures and species, and may be a normal part of development that promotes learning and independence.[3] Nevertheless, sensation-seeking behavior can result in actions that compromise survival (referred to as "risk-taking" behaviors) and involve sub-optimal decision-making. Risk-taking of all sorts — whether drunk driving, unprotected sex, experimentation with drugs, or even criminal activity — is so pervasive that "it is

---

[2] Linda Patia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCI. & BIOBEHAV. REVS. 417, 421 n. 1 (2000); Lawrence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence of a Dual Systems Model*, 44:6 DEVELOPMENTAL PSYCHOL. 1774 (2008); B.J. Casey et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 62-77 (2008); *see generally* Sarah Durston & B.J. Casey, *What Have We Learned About Cognitive Development from Neuroimaging?*, 44 NEUROPSYCHOLOGIA 2149 (2006).

[3] Beatrice Luna, *The Maturation of Cognitive Control and the Adolescent Brain*, *in* FROM ATTENTION TO GOAL-DIRECTED BEHAVIOR 250 (Francisco Aboitiz and Diego Cosmelli eds., Springer Berlin Heidelberg 2009) (explaining that "these behaviors may be necessary to develop the social skills needed to gain independence in adulthood").

statistically aberrant to refrain from such [risk-taking] behavior during adolescence."[4] The difference between adolescent and adult behavior, however, is not a function of adolescents' inability to distinguish right from wrong or in their intellectual abilities *per se*, but rather from psychosocial limitations in their ability to consistently and reliably control their behavior.[5]

Specifically, adolescents are less able, on average, than adults to self-regulate, or "cognitively" control, their behavior.[6] In this sense, "cognitive control" refers to the ability to voluntarily behave in a goal-oriented manner that requires a plan to be executed, especially when presented with more

---

[4] Spear, *supra* note 2, at 421; *see also* Casey (2008), *supra* note 2, at 65 ("[R]isk-taking appears to increase during adolescence relative to childhood and adulthood . . .. ").

[5] Elizabeth Cauffman & Lawrence Steinberg, *(Im)Maturity of Judgment in Adolescences: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 742 (2000); *see also* William Gardner, *A Life-Span Rational-Choice Theory of Risk Taking*, *in* ADOLESCENT AND ADULT RISK TAKING: THE EIGHTH TEXAS TECH SYMPOSIUM ON INTERFACES IN PSYCHOLOGY 66, 67 (N. Bell & R. Bell eds., 1993).

[6] *See* Deborah Yurgelun-Todd, *Emotional and Cognitive Changes During Adolescence*, 17 CURRENT OPINION IN NEUROBIOLOGY 251, 253 (2007); *see also* R.K. Lenroot & Jay N. Giedd, *Brain Development In Children And Adolescents: Insights From Anatomical Magnetic Resonance Imaging*, 30 NEUROSCI. & BEHAV. REVS. 718, 723 (2006); Luna, *supra* note 3, at 249, 51; *see also* Lawrence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 40-41 (2009) [hereinafter Steinberg, *Future Orientation*] ("[C]hanges in impulse control and planning are mediated by a 'cognitive control' network . . . which matures more gradually and over a longer period of time, into early adulthood.").

compelling short-term alternatives.[7] Scientists have identified various interrelated limitations in adolescents' self-regulatory abilities that contribute to their relative inability to control their impulses and their greater tendency to engage in risky or reckless behavior. To name just a few, adolescents (1) tend to be more strongly motivated by the possibility of reward than adults; (2) have greater difficultly controlling their impulses; and (3) have greater difficulty recognizing and regulating emotional responses. We take a closer look at each of these factors below.

Reward Sensitivity. One of the main reasons adolescents are more likely to engage in risky behavior than adults is that adolescents tend to experience heightened levels of sensitivity to rewards, especially to immediate rewards.[8] Placing a higher value on the potential reward leads to lower risk ratios for adolescents, relative to adults, and thus a higher likelihood of engaging in the risky behavior.[9] Adolescent behavioral research suggests that adolescents take more risks because they overvalue the potential reward, not because they are less able to appreciate the risks, as was once believed.[10] "[A]dolescents' greater involvement in risk-taking activity, as

---

[7] *See* Luna, *supra* note 3, at 251.

[8] *See* Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 16:3 ANN. REV. CLINICAL PSYCHOL. 47, 57 (2009) [hereinafter Steinberg, *Adolescent Development*].

[9] *Id.* at 57-58.

[10] *Id.* at 58.

compared to adults, does not appear to stem from youthful ignorance, irrationality, delusions of invulnerability, or misperceptions of risk."[11] Rather, it appears that adolescents and adults perceive *risks* similarly, but they evaluate potential *rewards* differently, especially when the risky behavior is weighed against the cost.[12]

Impulse Control. "A cornerstone of cognitive development is the ability to suppress inappropriate thoughts and actions in favor of goal-directed ones, especially in the presence of compelling incentives."[13] Impulse control means allowing a goal-directed response to override a more compelling, yet goal-inappropriate response.[14] The ability to control one's impulsive reactions to an event or problem is necessary to achieve adult levels of problem solving ability, logical reasoning,

---

[11] Elizabeth Cauffman & Elizabeth Shulman, *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, DEVELOPMENTAL PSYCHOL. (forthcoming 2009) (manuscript at 4); *see also* Steinberg, *Adolescent Development*, *supra* note 8, at 57.

[12] *See* Susan L. Andersen, *Trajectories of Brain Development: Point of Vulnerability or Window of Opportunity?* 27 NEUROSCI. AND BIOBEHAV. REVS 3, 3-18 (2003); Fulton Crews, Jun He & Clyde Hodge, *Adolescent Cortical Development: A Critical Period of Vulnerability for Addiction*, 86 PHARMACOLOGY BIOCHEMISTRY AND BEHAV. 189 (2007); Spear, *supra* note 2; Cauffman (2009), *supra* note 11, at 4; Steinberg (2008), *supra* note 2, at 1776 (linking lack of impulse control to sensation seeking behaviors).

[13] *See* Casey (2008), *supra* note 2, at 64.

[14] *See* Luna, *supra* note 3, at 251.

and the consistent exercise of good judgment.[15]

Adolescents have observable limitations in their ability to control their impulses. The relative inability of adolescents to control impulsive behavior is well-documented by studies on developmental changes in impulsivity and self-management over the course of adolescence.[16] "A number of classic developmental studies have shown that this ability develops throughout childhood and adolescence."[17] Capacity for self-direction has been shown to increase gradually throughout adolescence and into young adulthood.[18] Likewise, impulsivity tends to decline linearly between the ages of 10 and 30.[19] These findings indicate that adolescents have not yet attained adult levels of impulse control. In other words, adolescents are less able than adults to consistently reflect before they act.

Emotional Regulation. All individuals regulate their emotional responses to events. They increase or decrease their emotional

---

[15] *See id.*

[16] *See* Steinberg, *Adolescent Development*, *supra* note 8, at 58; *see also* Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCHOL. 1531, 1538 (2007); Steinberg (2008), *supra* note 2, at 1772-74.

[17] *See* Casey (2008), *supra* note 2, at 64.

[18] *See* Steinberg, *Future Orientation*, *supra* note 6, at 28-29, 38-40.

[19] Steinberg (2008), *supra* note 2, at 1776; *see* Steinberg, *Adolescent Development*, *supra* note 8, at 57.

reactions to stimuli in accordance with their behavioral goals.[20] The ability to regulate one's emotions efficiently is crucial for mental and physical health as well as for appropriate social interactions, and impairment of this capability is associated with affective disorders and a variety of other maladaptive psychological conditions.[21] This ability, however, does not develop fully until young adulthood.[22] As a result, similar to their ability to control impulses, adolescents have less ability to regulate their emotional responses to stimuli than adults.[23]

This relative limitation is important for understanding adolescents' ability to voluntarily control their behavior. Indeed, many situations, particularly those involving social interactions, arouse adolescents' emotional system and impact their ability to make informed decisions about their actions. Peer pressure, for example, can arouse emotions of fear, rejection, or desire to impress friends that can undermine the reliability of adolescent behavioral control systems and

---

[20] *See* Sang Hee Kim & Stephan Hamann, *Neural Correlates of Positive and Negative Emotion Regulation*, 19:5 J. COGNITIVE NEUROSCI. 776 (2007); Kelly Anne Barnes et al., *Developmental Differences in Cognitive Control of Socio-Affective Processing*, 32:3 DEVELOPMENTAL NEUROPSYCHOL. 787 (2007).

[21] *Id.* at 776.

[22] *See* Casey (2008), *supra* note 2, at 65.

[23] Isabelle M. Rosso et al., *Cognitive And Emotional Components of Frontal Lobe Functioning in Childhood and Adolescence*, 1021 ANNALS N.Y. ACAD. SCI. 355, 360-61 (2004).

result in actions taken without full consideration or appreciation of the consequences.[24]

Each of these attributes continues to develop throughout adolescence and early adulthood, and is critical to the ability to effectively and consistently control one's behavior.[25] The developmental immaturities that adolescents exhibit with respect to each of these attributes compound to make them particularly prone to engage in risky and sensation-seeking behavior.

Researchers have also found that these limitations are especially pronounced when other factors — such as stress, emotions, and peer pressure — enter the equation. These factors affect everyone's cognitive functioning, but they operate on the adolescent mind differently and with special force.

The interplay among stress, emotion, cognition, and voluntary behavior control in teenagers is particularly complex — and different from adults. Stress affects the ability to effectively regulate behavior as well as the ability to weigh costs and benefits and override impulses with rational thought.[26] Adolescents are more susceptible to stress from daily events than adults, which

---

[24] *See* Steinberg (2007), *supra* note 16, at 1536-38 (explaining that "resistance to peer influence increases linearly over the course of adolescence, especially between ages 14 and 18").

[25] *See* Casey (2008), *supra* note 2, at 68.

[26] *See* Spear, *supra* note 2, at 423; Lita Furby & Ruth Beyth-Maron, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1, 22 (1992).

translates into a further distortion of their already skewed cost-benefit analysis.[27]

Emotion, like stress, also plays an important role in the ability to voluntarily control behavior, influencing decision-making and risk-taking behavior.[28] Because of both their greater stress and more drastic hormonal fluctuations, and their relative inability to consistently regulate their emotional responses, adolescents are more emotionally volatile than adults — and children, for that matter.[29] As a result, adolescents tend to experience emotional states that are more extreme and more variable than those experienced by adults.[30]

In sum, the conclusion of the scientific research is that, for a variety of interrelated reasons, adolescents, as a group, cannot be expected to behave or make decisions in the same way as adults.

---

[27] *See* Spear, *supra* note 2, at 423; Furby, *supra* note 26, at 22.

[28] *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009, 1011-13 (2003).

[29] *See* Spear, *supra* note 2, at 429.

[30] *See id.* at 429; Cauffman (2000) *supra* note 5, at 743-45, 756-57, 59.

B. Recent Studies of the Brain Have Established a Biological Basis for the Observed Immaturities in Adolescent Behavior.

Modern brain research technologies have developed a body of data from the late 1990s to the present that provides a compelling picture of the inner workings of the adolescent brain.[31] Indeed, brain imaging data provides convergent evidence for the ways in which adolescents are still immature.[32] Developmental neuroscience has now gathered extensive evidence that both the structure of the adolescent brain, and the way it functions, are immature compared to the adult brain.

This insight emerges from sophisticated and non-invasive brain imaging techniques performed by high-resolution structural and functional magnetic resonance imaging ("MRI") and other technologies.[33] These imaging techniques are a

---

[31] *See* Sarah Durston et al., *Anatomical MRI of the Developing Human Brain: What Have We Learned?* 40 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1012, 1012 (2001) (reviewing results of MRI studies of brain development in childhood and adolescence); Michael S. Gazzaniga et al., COGNITIVE NEUROSCIENCE: THE BIOLOGY OF THE MIND 20-21, 138 (2d ed. 2002).

[32] *See* Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174, 8177 (2004).

[33] "MRI measures the response of atoms in different tissues when they are pulsed with radio waves that are under the influence of magnetic fields thousands of times the strength of the earth's. Each type of tissue responds differently, emitting

quantum leap beyond previous mechanisms for assessing brain development. Before the rise of neuroimaging, the understanding of brain development was gleaned largely from post-mortem examinations.[34] Modern imaging techniques, however, have begun to shed light on how a live brain operates, and how a particular brain develops over time.[35]

Technological breakthroughs have not only enabled scientists to confirm some of what was previously known or believed, but have also provided new evidence that has changed the way scientists understand the development of the

---

characteristic signals from the nuclei of its cells. The signals are fed into a computer, the position of those atoms is recorded, and a composite picture of the body area being examined is generated and studied in depth." Florence Antoine, *Cooperative Group Evaluating Diagnostic Imaging Techniques*, 81 J. NAT'L CANCER INST. 1347, 1348 (1989); *see also* Yurgelun-Todd, *supra* note 6, at 251-52 (explaining that "structural MRI and functional MRI (fMRI), have become important modalities for research on brain development as they have been able to provide a more detailed picture of how the brain changes. The application of these methods to the study of children and adolescents provides an extraordinary opportunity to advance our understanding of neurobiological changes and functional abilities associated with the brain.").

[34] *See* Gazzaniga, *supra* note 31, at 63.

[35] *See generally* Elizabeth R. Sowell et al., *Development of Cortical and Subcortical Brain Structures in Childhood and Adolescence: A Structural MRI Study*, 44 DEVELOPMENTAL MED. & CHILD NEUROLOGY 4 (2002); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. NEUROSCI. 8819 (2001).

human brain as it progresses from childhood through adolescence and into adulthood.[36] "Structural brain imaging studies in normal children and adolescents have been helpful in relating the dramatic maturation of cognitive, emotional, and social functions with the brain structures that ultimately underlie them."[37]

In this regard, two complementary observations have been especially revealing. First, the parts of the brain that work together to support the control of behavior, including the prefrontal cortex (which comprises roughly the front third of the human brain), continue to mature even through late adolescence.[38] Second, in making behavioral choices, adolescents rely more heavily than adults on systems and areas of the brain that promote risk-taking and sensation-seeking behavior.

---

[36] *See* Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCI. 859 (1999); *see also* Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCI. 861 (1999).

[37] Elizabeth R. Sowell et al., *Mapping Cortical Change Across the Human Life Span*, 6 NATURE NEUROSCI. 309 (2003); *see also* Gogtay, *supra* note 32, at 8177.

[38] *See* Casey (2008), *supra* note 2, at 68.

1. Adolescent Brains Are Structurally Immature in Areas of the Brain Associated With Enhanced Abilities of Executive Behavior Control.

When it comes to "response inhibition, emotional regulation, planning and organization," the so-called executive functions, a crucial part of the brain is the prefrontal cortex.[39] The prefrontal cortex is associated with a variety of cognitive abilities,[40] including those associated with voluntary behavior control and inhibition[41] such

---

[39] Sowell (1999), *supra* note 36, at 860; *see* Eveline A. Crone et al., *Neurocognitive Development of Relational Reasoning*, 12:1 DEVELOPMENTAL SCI. 55, 56 (2009) (explaining that "[n]europsychological and neuroimaging studies have shown that prefrontal cortex is strongly implicated in relational reasoning."); *see also* Gazzaniga, *supra* note 31, at 75; Isabelle M. Rosso et al., *Cognitive and Emotional Components of Frontal Lobe Functioning in Childhood and Adolescence*, 1021 ANNALS N.Y. ACAD. SCI. 355, 360-61 (2004) (finding a correlation between frontal lobe development in adolescents, response inhibition and social anxiety levels); *see generally*, Silvia A. Bunge et al., *Immature Frontal Lobe Contributions to Cognitive Control in Children: Evidence from fMRI*, 33 NEURON 301 (2002).

[40] *See* B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOL. 241, 244 (2000).

[41] *See* R. Dias et al., *Dissociable Forms of Inhibitory Control Within Prefrontal Cortex With an Analog of the Wisconsin Card Sort Test: Restriction to Novel Situations and Independence From "On-Line" Processing*, 17 J. NEUROSCI. 9285 (1997); Durston, *supra* note 27, at 1016; *see also* Yurgelun-Todd, *supra* note 6, at 253.

as risk assessment,[42] evaluation of reward and punishment,[43] and impulse control.[44] More generally, other functions associated with the prefrontal cortex include decision-making,[45] the ability to judge and evaluate future consequences,[46] recognizing deception,[47] responses to positive and negative feedback,[48] working memory,[49] and making moral judgments.[50]

---

[42] *See* Facundo Manes et al., *Decision-Making Processes Following Damage to the Prefrontal Cortex*, 125 BRAIN 624 (2002).

[43] *See* J. O'Doherty et al., *Abstract Reward and Punishment Representations in the Human Orbitofrontal Cortex*, 4 NATURE NEUROSCI. 95 (2001); Robert D. Rogers et al., *Choosing Between Small, Likely Rewards and Large, Unlikely Rewards Activates Inferior and Orbital Prefrontal Cortex*, 20 J. NEUROSCI. 9029 (1999).

[44] *See* Antoine Bechara et al., *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 BRAIN 2189, 2198-99 (2000).

[45] *See* Samantha B. Wright et al., *Neural Correlates of Fluid Reasoning in Children and Adults*, 1:8 FRONTIERS HUMAN NEUROSCI. 7 (2008) (finding that important changes in the prefrontal cortex during adolescence lead to the development of logical reasoning abilities); *see also* Antoine Bechara et al., *Dissociation of Working Memory from Decision Making Within the Human Prefrontal Cortex*, 18 J. NEUROSCI. 428 (1998).

[46] *See* Bechara (2000), *supra* note 44.

[47] *See* D. D. Langleben et al., *Brain Activity During Simulated Deception: An Event-Related Functional Magnetic Resonance Study*, 15 NEUROIMAGE 727 (2002).

[48] *See* R. Elliott et al., *Differential Neural Response to Positive and Negative Feedback in Planning and Guessing Tasks*, 35 NEUROPSYCHOLOGIA 1395 (1997).

[49] *See* Luna, *supra* note 3, at 264.

The brain's frontal lobes are still structurally immature well into late adolescence,[51] and the prefrontal cortex is "one of the last brain regions to mature."[52] This, in turn, means that "response inhibition, emotional regulation, planning and organization . . . continue to develop between adolescence and young adulthood."[53]

The adolescent's frontal lobes, and specifically the prefrontal cortex, are underdeveloped in two distinct ways, each of which directly affects brain functioning. First, pruning is incomplete. Second,

---

[50] *See* Jorge Moll et al., *Frontopolar and Anterior Temporal Cortex Activation in a Moral Judgment Task: Preliminary Functional MRI Results in Normal Subjects*, 59 ARQ NEUROPSIQUIATR 657 (2001); Steve W. Anderson et al., *Impairment of Social and Moral Behavior Related to Early Damage in Human Prefrontal Cortex*, 2 NATURE NEUROSCI. 1032 (1999).

[51] *See* Gogtay, *supra* note 32, at 8174 (subjects of study aged 4 to 21 years); Giedd, *supra* note 36, at 861 (subjects of study aged 4.2 to 21.6 years); Sowell (1999), *supra* note 36, at 860-61 (subjects of study aged 12 to 16 and 23 to 30 years); *see also* Sowell (2001), *supra* note 35, at 8026 (noting pronounced brain maturational processes continuing into post-adolescence; subjects of study aged 7 to 30 years); Sowell (2003), *supra* note 37, at 309 (subjects of study aged 7 to 87 years).

[52] Casey, *supra* note 40, at 243; *see also* Gogtay, *supra* note 32, at 8175.

[53] Sowell (1999), *supra* note 36, at 860; *see also* Kenneth E. Towbin & John E. Schowalter, *Adolescent Development*, *in* PSYCHIATRY 145, 151-52 (Allan Tasman ed., 2d ed. 2003).

This paper recognizes the link between "improvement during adolescence in specific cognitive skills such as organizing information, conceptualization, perspective taking, and social perception, to structural changes in frontal cortical and subcortical structures." *Id.* at 152.

myelination is incomplete. We discuss each in turn.

Pruning. Gray matter, which comprises the outer surfaces of the brain, is composed of cells called neurons that perform the brain's tasks, such as the higher functions that are carried out in the prefrontal cortex.[54] As the brain matures, gray matter *decreases*[55] through a process called pruning. Just as the pruning of a rose bush strengthens the remaining branches, the pruning of excess neurons and connections which make up the gray matter leads to greater efficiency of neural processing and strengthens the brain's ability to reason and consistently exercise good judgment.[56] Thus, pruning establishes some pathways and extinguishes others, enhancing overall brain functioning.

---

[54] *See* Gazzaniga, *supra* note 31, at 64-65; *see* Eric R. Kandel et al., PRINCIPLES OF NEURAL SCIENCE 9 (James H. Schwartz & Thomas M. Jessel, eds., McGraw-Hill 2000).

[55] *See* Durston, *supra* note 31, at 1014; Jay N. Giedd et al., *Anatomical Brain Magnetic Resonance Imaging of Typically Developing Children and Adolescents*, 48:5 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 465, 469 (2009).

[56] *See* Robert F. McGivern et al., *Cognitive Efficiency on a Match to Sample Task Decreases at the Onset of Puberty in Children*, 50 BRAIN & COGNITION 73 (2002) (subjects of study aged 10 to 22 years); Casey, *supra* note 40, at 241 ("findings are consistent with the view that increasing cognitive capacity during childhood coincides with a gradual loss rather than formation of new synapses . . ."); *see also* Daniel J. Siegel, THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE 13-14 (Guilford Press 1999).

Scientists have known about pruning for decades,[57] but modern brain imaging technology has provided important insights into the process.[58] Until MRI technology emerged, the common wisdom was that the volume of gray matter spurted only once, shortly after birth, and then declined gradually over time. Brain scans have revealed a more complicated reality: In particular regions of the brain, gray matter blossoms once again later in childhood.[59] Gray matter volumes peak during the ages from 10-20 years,[60] and the prefrontal cortex is one of the places where gray matter increases — before adolescence — and

---

[57] *See generally* Peter R. Huttenlocher, *Synaptic Density in Human Frontal Cortex: Developmental Changes and Effects of Aging*, 163 BRAIN RES. 195 (1979).

[58] *See, e.g.*, Sowell (2002), *supra* note 35, at 4.

[59] *See* McGivern, *supra* note 56, at 85; *see also* David N. Kennedy et al., *Basic Principles of MRI and Morphometry Studies of Human Brain Development*, 5 DEVELOPMENTAL SCI. 268, 274 (2002).

> Studies showed . . . nonlinear changes in cortical gray matter, summarized as a preadolescent increase followed by a postadolescent decrease. Further localization of these changes indicated that the frontal and parietal lobe peaked at about age 12, the temporal lobe at about age 16, and the occipital lobe continued its increase through age 20, although the confidence intervals on these observations are large.

Giedd, *supra* note 36, at 861.

[60] *See* Giedd, *supra* note 36, at 861; McGivern, *supra* note 56, at 85; Yurgelun-Todd, *supra* note 6, at 252, 55.

then gets pruned over time, beyond adolescence.[61] The prefrontal cortex is also one of the last regions where pruning is complete and this region continues to thin past adolescence.[62] This means that one of the last areas of the brain to reach full maturity, as measured by pruning, is the region most closely associated with risk assessment, impulse control, emotional regulation, decision-making, and planning — in other words, the ability to reliably and voluntarily control behavior.[63]

Myelination. Another important measure of brain maturity is myelination.[64] Myelination is the process by which the brain's axons are coated with a fatty white substance called myelin. Myelin surrounds the axons, which are neural fibers that use electrical impulses to carry

---

[61] *See* Jay N. Giedd, *The Teen Brain: Insights from Neuroimaging*, 42 J. ADOLESCENT HEALTH 335, 339 (2008).

[62] A study by the National Academy of Sciences measured gray matter density in individuals longitudinally from childhood to early adulthood and concluded that "the [gray matter] maturation ultimately involves the dorsolateral prefrontal cortex, which loses [gray matter] only at the end of adolescence." Gogtay, *supra* note 32, at 8175.

[63] *See id.* at 8177 (explaining that "[l]ater to mature were areas involved in executive function"); *see also* Michael C. Stevens et al., *Functional Neural Networks Underlying Response Inhibition in Adolescents and Adults*, 181 BEHAV. BRAIN RESEARCH 12 (2007).

[64] *See* Elkhonon Goldberg, THE EXECUTIVE BRAIN: FRONTAL LOBES & THE CIVILIZED MIND 144 (Oxford Univ. Press, 2001); *see also* Sowell (2001), *supra* note 32, at 8819; Sowell (2003), *supra* note 37, at 311; Yurgelun-Todd, *supra* note 6, at 253.

information across long distances, and insulates the pathway, speeding the neural signal along the pathway.[65] "The presence of myelin makes communication between different parts of the brain faster and more reliable."[66] Myelination of "white matter"[67] continues through adolescence and into adulthood.[68]

---

[65] *See* Zoltan Nagy, Helena Westerberg & Torkel Klingberg, *Maturation of White Matter is Associated with the Development of Cognitive Functions During Childhood*, 16:7 J. COGNITIVE NEUROSCI. 1227, 1231-32 (2004) (explaining that "the physiological effects of increases in axon thickness and myelination are similar in that they both increase conduction speed."); Gazzaniga, *supra* note 31, at 31, 48-49.

[66] Goldberg, *supra* note 64, at 144.

[67] White matter is the tissue that composes the pathways between brain regions and that permits communication and interaction within the brain and between the brain and the body. *See* Gazzaniga, *supra* note 31, at 70, 72. For example, the corpus callosum, a critical white matter structure, bridges the two halves of the frontal lobes, permitting and regulating communication between the two halves of the brain. *See* Tomas Paus et al., *Structural Maturation of Neural Pathways in Children and Adolescents: In Vivo Study*, 283 SCI. 1908 (1999).

[68] *See* Zoltan Nagy, Helena Westerberg & Torkel Klingberg, *Maturation of White Matter is Associated with the Development of Cognitive Functions During Childhood*, 16:7 J. COGNITIVE NEUROSCI. 1227, 1231-32 (2004); Durston, *supra* note 31, at 1014; Sowell (1999), *supra* note 36, at 860; Adolf Pfefferbaum et al., *A Quantitative Magnetic Resonance Imaging Study of Changes in Brain Morphology from Infancy to Late Adulthood*, 51 ARCHIVES OF NEUROLOGY 874, 885 (1994) (after age 20 white matter volume did not fluctuate until about age 70; subjects of study aged 3 months to 70 years).

As measured by myelination, different parts of the brain mature at different rates.[69] Brain imaging data, supported by data gathered through the older autopsy technique,[70] provides credible evidence that the prefrontal cortex is still developing well into adolescence and beyond and is among the last portions of the brain to mature.[71] In other words, development of the region of the brain associated with voluntary behavior control (*i.e.*, risk assessment, impulse control, and emotional regulation) is not complete until late adolescence or beyond.

Myelination also increases the efficiency of information processing and supports the integration of the widely distributed circuitry needed for complex behavior.[72] These structural changes are believed to underlie the functional integration (discussed below) of frontal regions with the rest of the brain.[73] The functional improvement of the

---

[69] *See* Sowell (2003), *supra* note 37, at 311; Sowell (2002), *supra* note 35, at 4; Towbin & Schowalter, *supra* note 53, at 151.

[70] *See* Paus, *supra* note 67, at 1908.

[71] Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174, 8177 (2004) (noting that different parts of the brain undergo myelination and pruning at different rates, and finding that the higher-order cortices mature later than lower-order cortices."); *see also* Sowell (1999), *supra* note 36, at 859; K. Rubia et al., *Functional Frontalisation with Age: Mapping Neurodevelopmental Trajectories with fMRI*, 24 NEUROSCI. & BIOBEHAV. REVS.13 (2000) (subjects of study aged 12 to 19 and 22 to 40 years).

[72] *See* Luna, *supra* note 3, at 257.

[73] *See id.; see also* Giedd, *supra* note 55, at 467.

connections between the various regions of the brain is believed to result from myelination that occurs during adolescence and is necessary for improved abilities of reliable self-control and better decision-making.[74] For example, recent research on the neural underpinnings of resistance to peer influence in adolescence indicates that improvements in this capacity may be linked to the development of greater connectivity between brain regions, and likely facilitates the better coordination of affect and cognition.[75] More generally, however, the development of improved self-regulatory abilities during and after adolescence is positively correlated with white matter maturation through the process of myelination.[76]

2. Adolescent Brains Tend to Be More Active Than Adult Brains in Regions Associated With Risky, Impulsive, and Sensation-Seeking Behavior and Less Active in Regions Associated With the Ability to Voluntarily Control Behavior.

The brain is a complex network of interrelated parts. Each part is associated with different

---

[74] *See* Steinberg, *Adolescent Development*, *supra* note 8, at 56; B. Luna & J. A. Sweeney, *The Emergence of Collaborative Brain Function: fMRI Studies of the Development of Response Inhibition*, 1021 ANNALS N.Y. ACAD. SCI. 296-309 (2004); Damien A. Fair et al., *Development of Distinct Control Networks Through Segregation and Integration*, 104 PROC. NAT'L ACAD. SCI. U.S. 13507 (2007).

[75] *See* Steinberg, *Adolescent Development*, *supra* note 8, at 56.

[76] *See* Nagy, *supra* note 65, at 1231-32.

functions and works in conjunction with other parts to form systems. In general, the two neurobiological systems that inform our understanding of adolescent behavior, as discussed above in Point A, are (1) the socioemotional system, which is localized in the limbic and paralimbic regions of the brain; and (2) the cognitive control system, which is generally comprised of regions of the frontal lobes, and specifically, the prefrontal cortex.[77] The differences between adolescent and adult behavior correlate with their respective and disparate reliance on each of these systems and their related brain structures.[78]

The structural immaturities of the adolescent brain discussed above represent only one dimension of the immaturity of the adolescent brain. Developmental neuroimaging studies demonstrate that the regions of the brain associated with voluntary behavior control mature structurally at the same time as specific changes occur in how the brain functions.[79] These findings

---

[77] *See* Steinberg, *Adolescent Development*, *supra* note 8, at 54.

[78] Stephanie Burnett et al., *Development During Adolescence of the Neural Processing of Social Emotion*, 21:9 J. COGNITIVE NEUROSCI. 173 (2009); S J Blakemore, *Adolescent Development of the Neural Circuitry for Thinking About Intentions*, 2:2 SOC. COGNITIVE & AFFECTIVE NEUROSCI. 130 (2007).

[79] Amy L. Krain et al., *An fMRI Examination of Developmental Differences in the Neural Correlates of Uncertainty and Decision Making*, 47:10 J. CHILD PSYCHOL. & PSYCHIATRY 1023, 1024 (2006); *see also* Liston C. Watts et al., *Frontostriatal Microstructure Predicts Individual Differences in Cognitive Control*, 16:4 CEREBRAL CORTEX 553 (2006); B.J. Casey et al.,

reveal that adolescents and adults exhibit different patterns of brain activity during decision-making tasks and provide insight into the neural underpinnings of the risky, impulsive, and sensation-seeking behavior of adolescents.[80]

Studies show that the socioemotional system, which is responsible for motivating risky and reward-based behavior, develops earlier than the cognitive control system, which regulates such behavior. Furthermore, during adolescence, the socioemotional system continues to develop more quickly than the cognitive control system.[81] The result is that adolescents experience increasing motivation for risky and reward-seeking behavior without a corresponding increase in the ability to self-regulate behavior.

The earlier development of the socioemotional system is evident in a number of areas of the brain. Among these are the amygdala and the

---

Contribution of Frontostriatal Fiber Tracts to Cognitive Control in Parent–Child Dyads With ADHD, 164:11 AM. J. PSYCHIATRY 1729 (2007).

[80] Krain, *supra* note 79; *see also* Adriana Galvan et al., *Earlier Development of the Accumbens Relative to Orbitofrontal Cortex Might Underlie Risk-Taking Behavior in Adolescents*, 26:25 J. NEUROSCI. 6885 (2006); Todd A. Hare et al., *Biolgical Substrates of Emotional Reactivity and Regulation in Adolescence During an Emotional Go-Nogo Task*, 63:10 BIOLOGICAL PSYCHIATRY 927 (2008).

[81] *See* Steinberg, *Adolescent Development*, *supra* note 8, at 54; *see also* Monique Ernst et al., *Neurobiology of the Development of Motivated Behaviors in Adolescence: A Window into a Neural Systems Model*, 93 PHARMACOLOGY, BIOCHEMISTRY & BEHAV. 199 (2009).

nucleus accumbens. An imbalance of dopamine and serotonin levels in the adolescent brain also contributes to the relative dominance of the adolescent socioemotional system.

Amygdala. The amygdala is associated with aggressive and impulsive behavior.[82] The amygdala is "a neural system that evolved to detect danger and produce rapid protective responses without conscious participation."[83] It dictates instinctive gut reactions, including fight

---

[82] *See generally* Jan Gläscher & Ralph Adolphs, *Processing of the Arousal of Subliminal and Supraliminal Emotional Stimuli by the Human Amygdala*, 23 J. NEUROSCI. 10274 (2003); Ralph Adolphs, *Neural Systems for Recognizing Emotion*, 12 CURRENT OPINION IN NEUROBIO. 169 (2002); Gazzaniga, *supra* note 31, at 553-72; K. Luan Phan et al., *Functional Neuroanatomy of Emotion: A Meta-Analysis of Emotion Activation Studies in PET and fMRI*, 16 NEUROIMAGE 331, 336 (2002); Goldberg, *supra* note 64, at 31; Kevin S. LaBar et al., *Human Amygdala Activation During Conditioned Fear Acquisition and Extinction: A Mixed-Trial fMRI Study*, 20 NEURON 937 (1998); Richard D. Lane et al., *Neuroanatomical Correlates of Pleasant and Unpleasant Emotion*, 35 NEUROPSYCHOLOGIA 1437, 1441 (1997); Hans C. Breiter et al., *Response and Habituation of the Human Amygdala During Visual Processing of Facial Expression*, 17 NEURON 875 (1996); Steinberg, *Future Orientation*, *supra* note 6, at 40.

[83] Abigail A. Baird et al., *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1, 1 (1999) (study found that adolescents 12-17 years old showed significant amygdala activation in response to a task that required the judgment of fearful facial affect); *see also* William D.S. Killgore & Deborah Yurgelun-Todd, *Activation of the Amygdala and Anterior Cingulate During Nonconscious Processing of Sad Versus Happy Faces*, 21 NEUROIMAGE 1215 (2004); Phan, *supra* note 82, at 336

or flight responses.[84] The amygdala is also a key component of circuitry involved in assessing salience, or the importance of environmental stimuli to survival, and is generally associated with processing emotional responses to a perceived danger.[85]

The prefrontal cortex — the primary region associated with self-regulation and the cognitive control system — modulates function in the amygdala[86] to which it is strongly connected.[87] A still-maturing prefrontal cortex exerts less control over the amygdala and has less influence over behavior and emotions than a fully mature prefrontal cortex.[88]

---

[84] *See* Goldberg, *supra* note 64, at 31; Phan, *supra* note 82, at 336.

[85] *See* Giedd (2008), *supra* note 61, at 338.

[86] *See* Mario Beauregard et al., *Neural Correlates of Conscious Self-Regulation of Emotion*, 21 J. NEUROSCI. 165RC (2001); Ahmad Hariri et al., *Modulating Emotional Responses: Effects of a Neocortical Network on the Limbic System*, 11 NEUROREPORT 43 (2000).

[87] Ralph Adolphs, *The Human Amygdala and Emotion*, 5 NEUROSCIENTIST 125, 125-26 (1999); *see also* Joseph LeDoux, THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE 303 (1996).

[88] *See* Neir Eshel et al., *Neural Substrates of Choice in Adults and Adolescents: Development of the Ventrolateral Prefrontal and Anterior Cingulate Cortices*, 45 NEUROPSYCHOLOGIA 1270, 1270-71 (2007) (reporting prefrontal brain areas associated with higher-order cognition, emotional regulation, reward values, and behavior control are some of the last to mature and that this lag in maturation may explain why adolescents demonstrate poor decision-making); *see also* Gargi Talukder,

Nucleus Accumbens. The nucleus accumbens, on the other hand, is associated with reward processing. Its primary function is to process emotional response to a potential reward.[89] Studies show that when making decisions, "relative to children and adults, adolescents show exaggerated activation of the accumbens, in concert with less mature recruitment of top-down prefrontal control."[90] This exaggerated activity is consistent with the tendency of adolescents to overvalue rewards in risk-reward assessment and provides an anatomical basis for the "increased impulsive and risky behaviors observed during [adolescence]."[91]

Dopamine and Serotonin. Dopamine is a neurotransmitter known to be involved with pleasure and motivation and plays a critical role in the functioning of the developing adolescent brain.[92] Around the time of puberty, adolescents experience "a rapid and dramatic increase in dopaminergic activity within the socioemotional system."[93] Because dopamine plays a critical role in the brain's reward circuitry this increase in

---

Decision-Making Is Still a Work in Progress for Teenagers, Report dated July 2000 at http://www.brainconnection.com; *see also* Spear, *supra* note 2, at 440 (reporting Dr. Yurgelun-Todd's research); *see also* Adolphs (1995), *supra* note 81, at 5889.

[89] Galvan, *supra* note 80, at 6890.

[90] *See* Casey, *supra* note 2, at 69.

[91] *See id.* at 69-70.

[92] *See* Andersen, *supra* note 12, at 3-18; Crews, *supra* note 12, at 189-199; Spear (2000), *supra* note 2, at 417-63.

[93] Steinberg, *Adolescent Development*, *supra* note 8, at 54.

activity is likely to promote reward-seeking behavior.[94] At the same time, adolescents have correspondingly lower levels of serotonin, a neurotransmitter known to support inhibitory control.[95] This imbalance between lower levels of serotonin and higher levels of dopamine during adolescence correlates with the observed prevalence of risky and impulsive decision making by adolescents.

In sum, adolescent behavior is characterized by a hyperactive reward-driven system (involving the nucleus accumbens), a limited harm-avoidant system (involving the amygdala), and an immature cognitive control system (involving the prefrontal cortex).[96] As a result, adolescent behavior is more likely to be impulsive and motivated by the possibility of reward, with less self-regulation and effective risk assessment.

Adolescence is a time of great physiological and psychological development. It is also a time marked by impulsive, risky, and sensation-seeking behavior. Scientific research has shed light on the biological mechanisms that help to explain this behavior. The latest scientific

---

[94] *Id.* at 258; *see* Luna, *supra* note 3, at 258.

[95] *See* Luna, *supra* note 3, at 258; R. Andrew Chambers, Jane R. Taylor & Marc N. Potenza, *Developmental Neurocircuitry of Motivation in Adolescence: A Critical Period of Addiction Vulnerability*, 160 AM. J. PSYCHIATRY 1041 (2003).

[96] Monique Ernst et al., *Triadic Model of the Neurobiology of Motivated Behavior in Adolescence*, 36 PSYCHOL. MED. 299, 300-02 (2006).

research on the development of the adolescent brain establishes that "the brain systems that are crucial for exerting cognitive control over behavior and processing rewards are still immature during adolescence."[97] "These immaturities result in a system that is able to exert cognitive control, but in an inconsistent manner with limited flexibility and motivational control."[98] In other words, "the basic elements are established, but refinements are needed to support the necessary efficiency in circuit processing to establish reliable executive control."[99] As one researcher put it, the process of adolescent development is akin to "starting the engines without a skilled driver behind the wheel."[100]

CONCLUSION

While not formally supporting either party in these cases, the *amici* hope that the Court will consider the scientific evidence presented here in

---

[97] *See* Luna, *supra* note 3, at 258; *see also* Ryan L. Muetzel et al., *The Development of Corpus Callosum Microstructure and Associations With Bimanual Task Performance in Healthy Adolescents*, 39:4 NEUROIMAGE 1918 (2008); Elizabeth A. Olson, *White Matter Integrity Predicts Delay Discounting Behavior in Adolescents: A Diffusion Tensor Imaging Study*, 21:7 J. COGNITIVE NEUROSCI. 1406 (2008); Elizabeth A. Olson, *Delay and Probability Discounting Behavior in Healthy Adolescents: Associations With Age, Personality Style, and Other Measures of Executive Function*, 43:7 PERSONALITY AND INDIVIDUAL DIFFERENCES 1886 (2007).

[98] *See* Luna, *supra* note 3, at 258.

[99] *Id.*

[100] Steinberg, *Adolescent Development*, *supra* note 8, at 56.

its deliberations about whether, in the present case, the Eighth Amendment (1) requires that these defendants be held to a different standard of culpability from that which applies to adults and (2) prohibits the imposition of a sentence of life without the possibility of parole on an adolescent offender.

Respectfully submitted,

E. Joshua Rosenkranz
Counsel of Record
Gregory S. Schwegmann
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103-0001
(212) 506-5000

Khai LeQuang
ORRICK, HERRINGTON & SUTCLIFFE LLP
777 South Figueroa Street
Suite 3200
Los Angeles, CA 90017-5855
213-629-2020

Counsel for Amici Curiae

July 23, 2009

CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the document contains 7,327 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 23, 2009.

E. Joshua Rosenkranz

AMICUS CURIAE BRIEF

134

Nos. 08-7412, 08-7621

Supreme Court, U.S.
FILED
JUL 23 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE
FLORIDA DISTRICT COURT OF APPEAL, FIRST DISTRICT

BRIEF FOR THE AMERICAN PSYCHOLOGICAL ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND MENTAL HEALTH AMERICA AS AMICI CURIAE SUPPORTING PETITIONERS

NATHALIE F.P. GILFOYLE
GENERAL COUNSEL
AMERICAN PSYCHOLOGICAL ASSOCIATION
750 First Street, N.E.
Washington, D.C. 20002
(202) 336-5500

DANIELLE SPINELLI
Counsel of Record
ANNE HARKAVY
SHIRLEY WOODWARD
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

Counsel for Amicus Curiae American Psychological Association
Additional Counsel Listed on Inside Cover

TC+TA
OCS 4V2PSV

971e 47

RICHARD TARANTO
FARR & TARANTO
1150 18th Street, N.W.
Washington, D.C. 20036
(202) 775-0184

Counsel for American Psychiatric Association

CAROLYN I. POLOWY
GENERAL COUNSEL
SHERRI MORGAN
ASSOCIATE COUNSEL
NATIONAL ASSOCIATION OF SOCIAL WORKERS
750 First Street, N.E.
Suite 700
Washington, D.C. 20002
(202) 408-8600

Counsel for National Association of Social Workers

MARK J. HEYRMAN
CLINICAL PROFESSOR OF LAW
UNIVERSITY OF CHICAGO LAW SCHOOL
1111 East 60th Street
Chicago, Illinois 60637
(773) 702-9611

Counsel for Mental Health America

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. RESEARCH IN DEVELOPMENTAL PSYCHOLOGY AND NEUROSCIENCE DOCUMENTS JUVENILES' GREATER IMMATURITY, VULNERABILITY, AND CHANGEABILITY 6

A. Developmental Psychology And Social Science Research Confirms That Juveniles Are Less Mature, More Vulnerable, And More Changeable Than Adults 7

1. Juveniles have a lesser capacity for mature judgment 7

2. Juveniles are more vulnerable to negative external influences 15

3. Juveniles' unformed identity makes it less likely that their offenses evince a fixed bad character and more likely that they will reform 19

B. Juveniles' Psychosocial Immaturity Is Consistent With Emerging Research Regarding Brain Development 22

TABLE OF CONTENTS—Continued

Page

II. SENTENCING THE JUVENILE OFFENDERS IN THESE CASES TO DIE IN PRISON WITH NO OPPORTUNITY TO DEMONSTRATE REFORM IS A DISPROPORTIONATE PUNISHMENT 28

CONCLUSION 34

TABLE OF AUTHORITIES

CASES

Page(s)

Atkins v. *Virginia*, 536 U.S. 304 (2002) 31

Eddings v. *Oklahoma*, 455 U.S. 104 (1982) 18, 28, 31

Ewing v. *California*, 538 U.S. 11 (2003) 29, 30

Harmelin v. *Michigan*, 501 U.S. 957 (1991) 28, 29

Hodgson v. *Minnesota*, 497 U.S. 417 (1990) 13

Johnson v. *Texas*, 509 U.S. 350 (1993) 7

Lockett v. *Ohio*, 438 U.S. 586 (1978) 29

Lockyer v. *Andrade*, 538 U.S. 63 (2003) 29, 30

Morissette v. *United States*, 342 U.S. 246 (1952) 31

Roper v. *Simmons*, 543 U.S. 551 (2005) ..... *passim*

Solem v. *Helm*, 463 U.S. 277 (1983) 29

Tennard v. *Dretke*, 542 U.S. 274 (2004) 13

Thompson v. *Oklahoma*, 487 U.S. 815 (1988) 3, 28, 30

OTHER AUTHORITIES

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. rev. 2000) 21

Arnett, Jeffrey, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339 (1992) ..... *passim*

Bechara, Antoine, et al., *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 Brain 2189 (2000) 24

TABLE OF AUTHORITIES—Continued

Page(s)

Bechara, Antoine, et al., *Dissociation of Working Memory from Decision Making Within the Human Prefrontal Cortex*, 18 J. Neurosci. 428 (1998) 24

Berndt, Thomas J., *Developmental Changes in Conformity to Peers and Parents*, 15 Developmental Psychol. 608 (1979) 16

Casey, B.J., et al., *Structural and Functional Brain Development and its Relation to Cognitive Development*, 54 Biological Psychol. 241 (2000) 25, 26, 27

Cauffman, Elizabeth, & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 Behav. Sci. & L. 741 (2000) 9, 12, 13, 14, 15

Cauffman, Elizabeth, et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Test*, Developmental Psychol. (forthcoming 2009) 11

Damasio, Antonio R. & Steven W. Anderson, *The Frontal Lobes, in Clinical Neuropsychology* 404 (Kenneth M. Heilman & Edward Valenstein eds., 4th ed. 2003) 25

DOJ Statistical Briefing Book, *available at* www.ojjdp.ncjrs.org/ojstatbb/crime/qa05301.asp?qaDate=20040801 *and* www.ojjdp.ncjrs.org/ojstatbb/crime/qa05305.asp?qaDate=20040801 (last visited July 20, 2009) 8

TABLE OF AUTHORITIES—Continued

Page(s)

Edens, John F., et al., *Assessment of "Juvenile Psychopathy" and Its Association with Violence: A Critical Review*, 19 Behav. Sci. & L. 53 (2001) 21

Erickson, Kristan, et al., A *Social Process Model of Adolescent Deviance: Combining Social Control and Differential Association Perspectives*, 29 J. Youth & Adolescence 395 (2000) 16

Eshel, Neir, et al., *Neural Substrates of Choice Selection in Adults and Adolescents: Development of the Ventrolateral Prefrontal and Anterior Cingulate Cortices*, 45 Neuropsychologia 1270 (2007) 23, 26

Fagan, Jeffrey, *Contexts of Choice by Adolescents in Criminal Events, in Youth on Trial* 371 (Thomas Grisso & Robert G. Schwartz eds., 2000) 15, 16

Galvan, Adriana, et al., *Risk Taking and the Adolescent Brain: Who is at Risk?*, 10 Developmental Sci. F8 (2007) 9

Gardner, Margo & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 Developmental Psychol. 625 (2005) 16, 17

TABLE OF AUTHORITIES—Continued

Page(s)

Giedd, Jay N., et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 Nature Neurosci. 861 (1999) 24, 27

Gogtay, Nitin, et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 Proc. Nat'l Acad. Sci. 8174 (2004) 25, 26

Goldberg, Elkhonon, *The Executive Brain: Frontal Lobes and the Civilized Mind* (2001) 25, 26, 27

Grisso, Thomas, *Double Jeopardy: Adolescent Offenders with Mental Disorders* (2005) 21

Grisso, Thomas, et al., *Juveniles' Competence to Stand Trial*, 27 Law & Hum. Behav. 333 (2003) 14

Halpern-Felsher, Bonnie L. & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. Applied Developmental Psychol. 257 (2001) 10, 11, 14, 15

Huttenlocher, Peter R., *Neural Plasticity: The Effects of Environment on the Development of the Cerebral Cortex* (2002) 26, 27

Jensen, Eric L. & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 Crime & Delinq. 96 (1994) 32

TABLE OF AUTHORITIES—Continued

Page(s)

Kazdin, Alan E., *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths, in Youth on Trial* 33 (Thomas Grisso & Robert G. Schwartz eds., 2000) 15

Keating, Daniel P., *Cognitive and Brain Development, in Handbook of Adolescent Psychology* 45 (Richard M. Lerner & Laurence Steinberg eds., 2004) 14

Kwong, Kenneth K., et al., *Dynamic Magnetic Resonance Imaging of Human Brain Activity During Primary Sensory Stimulation*, 89 Proc. Nat'l Acad. Sci. 5675 (1992) 24

Leshem, Rotem & Joseph Glicksohn, *The Construct of Impulsivity Revisited*, 43 Personality & Individual Differences 681 (2007) 9

Lynam, Donald R., *Longitudinal Evidence That Psychopathy Scores in Early Adolescence Predict Adult Psychopathy*, 116 J. Abnormal Psychol. 155 (2007) 22

McCord, Joan & Kevin P. Conway, *Co-Offending and Patterns of Juvenile Crime* (Dec. 2005) 18

Millstein, Susan G. & Bonnie L. Halpern-Felsher, *Perceptions of Risk and Vulnerability, in Adolescent Risk and Vulnerability* 15 (Baruch Fischoff et al. eds., 2001) 10

TABLE OF AUTHORITIES—Continued

Page(s)

Modecki, Kathryn, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences in Delinquency*, 32 Law & Hum. Behav. 78 (2008) 23

Moffitt, Terrie E., *Natural Histories of Delinquency, in Cross-National Longitudinal Research on Human Development and Criminal Behavior* 3 (Elmar G.M. Weitekamp & Hans-Jürgen Kerner eds., 1994) 8

Moffitt, Terrie E., *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 Psychol. Rev. 674 (1993) 8, 17, 20

Mulvey, Edward P. & Elizabeth Cauffman, *The Inherent Limits of Predicting School Violence*, 56 Am. Psychologist 797 (2001) 21

Nurmi, Jari-Erik, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 Developmental Rev. 1 (1991) 12

Paus, Tomáš, *Brain Development, in Handbook of Adolescent Psychology* 95 (Richard M. Lerner & Laurence Steinberg eds., 2009) 24

Reiss, Allan L., *et al.*, *Brain Development, Gender and IQ in Children: A Volumetric Imaging Study*, 119 Brain 1763 (1996) 26, 27

Scott, Elizabeth S. & Laurence Steinberg, *Rethinking Juvenile Justice* (2008) 16, 17, 18, 19

TABLE OF AUTHORITIES—Continued

Page(s)

Scott, Elizabeth S., et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 Law & Hum. Behav. 221 (1995) 13

Singer, Simon I. & David McDowall, *Criminalizing Delinquency: The Deterrent Effect of the New York Juvenile Offender Law*, 22 Law & Soc'y Rev. 521 (1988) 32

Snyder, Howard N. & Melissa Sickmund, National Center for Juvenile Justice, *Juvenile Offenders and Victims: 1999 National Report* (1999) 18

Sowell, Elizabeth R., et al., In Vivo *Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neurosci. 859 (1999) 25

Sowell, Elizabeth R., et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. Neurosci. 8819 (2001) 26, 27

Spear, Linda, *The Behavioral Neuroscience of Adolescence* (forthcoming 2009) 24, 25, 26

Steinberg, Laurence, *Adolescent Development and Juvenile Justice*, 5 Ann. Rev. Clinical Psychol. 47 (2008) 15

Steinberg, Laurence, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 Developmental Rev. 78 (2008) 23, 26, 27

TABLE OF AUTHORITIES—Continued

Page(s)

Steinberg, Laurence & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 Developmental Psychol. 1531 (2007) 16

Steinberg, Laurence & Robert G. Schwartz, *Developmental Psychology Goes to Court, in Youth on Trial* 9 (Thomas Grisso & Robert G. Schwartz eds., 2000) 19

Steinberg, Laurence & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009 (2003) 10, 20, 31

Steinberg, Laurence & Susan B. Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 Child Dev. 841 (1986) 16

Steinberg, Laurence, et al., *Age Differences in Future Orientation and Delay Discounting*, 80 Child Dev. 28 (2009) 12

Steinberg, Laurence, et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 Developmental Psychol. 1764 (2008) 9, 23

Steinberg, Laurence, et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, Am. Psychologist (forthcoming 2009) 13, 14, 23

TABLE OF AUTHORITIES—Continued

Page(s)

Waterman, Alan S., *Identity Development from Adolescence to Adulthood*, 18 Developmental Psychol. 341 (1982) 19

Zimring, Franklin E., *Penal Proportionality for the Young Offender, in Youth on Trial* 271 (Thomas Grisso & Robert G. Schwartz eds., 2000) 10, 17, 18

INTEREST OF AMICI CURIAE[1]

The American Psychological Association is a voluntary nonprofit scientific and professional organization with more than 152,000 members and affiliates. Since 1892, the Association has been the principal organization of psychologists in the United States. Its membership includes the vast majority of psychologists holding doctoral degrees from accredited universities in the United States.[2]

An integral part of the Association's mission is to increase and disseminate knowledge regarding human behavior and to advance psychology as a science, profession, and means of promoting health, education, and human welfare. Based on the well-developed body of research distinguishing the developmental characteristics of juveniles from those of adults, the Association has endorsed the policy reflected in the United Nations Convention on the Rights of the Child, which rejects life imprisonment without possibility of release for offenses committed by persons below 18 years of age.

---

[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), letters consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than the amici curiae, their members, or their counsel made any monetary contribution to the preparation or submission of this brief.

[2] Amici acknowledge the assistance of Laurence Steinberg, Ph.D., Thomas Grisso, Ph.D., Joel Dvoskin, Ph.D., and Brian Wilcox, Ph.D., in the preparation of this brief.

Research cited in this brief includes data from studies conducted using the scientific method. Such research typically is subject to critical review by outside experts, usually during the peer review process preceding publication in a scholarly journal.

The American Psychiatric Association, with roughly 35,000 members, is the principal association of physicians who specialize in psychiatry. It has an interest in this Court's understanding of the lessons of scientific study and professional experience as the Court applies constitutional principles to individuals who often are patients of the organization's members.

The National Association of Social Workers (NASW) is the largest association of professional social workers in the world, with 147,000 members and 56 chapters throughout the United States and abroad. NASW conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on relevant issues of importance. NASW opposes any legislation or prosecutorial discretion permitting children to be charged and punished under adult standards.

Mental Health America (MHA) (formerly known as the National Mental Health Association) is the oldest mental health advocacy and education organization in the United States. Its board and staff are comprised of professionals with expertise in the diagnosis and treatment of mental illnesses, persons with mental illnesses, and other persons with expertise in mental health public policy. MHA is interested in ensuring that determinations about criminal sanctions imposed upon juveniles reflect the scientific consensus regarding juveniles' ability to understand the nature and consequences of their acts, their response to deterrence, and the likelihood that they can be successfully treated or rehabilitated.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Roper* v. *Simmons*, this Court held that imposition of the death penalty on those under the age of 18 violated the basic precept that punishment should be proportionate to the culpability of the offender. 543 U.S. 551, 568-575 (2005). The Court explained that juveniles differ from adults in several ways that—without excusing their crimes—reduce juveniles' culpability and undermine any justification for definitively ending their free lives: they lack adults' capacity for mature judgment; they are more vulnerable to negative external influences; and their characters are not yet fully formed. *Id.* at 569-570. "The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" *Id.* at 570 (quoting *Thompson* v. *Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion)). Juveniles' vulnerability and lack of control over their surroundings "mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their ... environment." *Id.* And "[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of [an] irretrievably depraved character." *Id.*

Research in developmental psychology and neuroscience—including the research presented to the Court in *Simmons* and additional research conducted since *Simmons* was decided—confirms and strengthens the conclusion that juveniles, as a group, differ from adults in the salient ways the Court identified. Juveniles—including older adolescents—are less able to restrain their impulses and exercise self-control; less capable than adults of considering alternative courses of action and maturely weighing risks and rewards; and less ori-

ented to the future and thus less capable of apprehending the consequences of their often-impulsive actions. For all those reasons, even once their general cognitive abilities approximate those of adults, juveniles are less capable than adults of mature judgment, and more likely to engage in risky, even criminal, behavior as a result of that immaturity. Research also demonstrates that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," while at the same time they lack the freedom and autonomy that adults possess to escape such pressures. *Simmons*, 543 U.S. at 569. Finally, because juveniles are still in the process of forming a coherent identity, adolescent crime often reflects the "signature"—and transient—"qualities of youth" itself, *id.* at 570, rather than an entrenched bad character. Research has documented that the vast majority of youthful offenders will desist from criminal behavior in adulthood. And the malleability of adolescence means that there is no reliable way to identify the minority who will not.

Consistently with these recognized developmental characteristics of adolescents, recent neuroscience research shows that adolescent brains are not yet fully developed in regions related to higher-order executive functions such as impulse control, planning ahead, and risk evaluation. That anatomical immaturity is consonant with juveniles' demonstrated psychosocial (that is, social and emotional) immaturity.

This Court held in *Simmons* that juveniles' developmental characteristics mitigated their culpability and made death a disproportionate punishment for juvenile offenders. Those same characteristics support the conclusion that sentencing juveniles to die in prison for the crimes at issue here is likewise a disproportionate pun-

ishment. While this Court has recognized that imposition of the death penalty raises special concern and calls for special precautions in light of death's finality and irreversibility, it has also recognized that the Eighth Amendment forbids any punishment that is seriously disproportionate to the culpability of the offender. A sentence of life imprisonment without the possibility of parole, like a sentence of death, is in a very real sense final: it condemns the offender to die in prison without affording him any opportunity to demonstrate a reformed moral character that might warrant release. And that sentence is particularly harsh as applied to a juvenile, who will never experience free adulthood.

Yet juveniles' immaturity and vulnerability mean that "the case for retribution is not as strong with a minor as with an adult." *Simmons*, 543 U.S. at 571. Moreover, "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Id.* Finally, the imposition of life without parole for a crime committed as a juvenile—a sentence that rejects the possibility of redemption—cannot be reconciled with juveniles' unformed characters and the likelihood that they will change as adults. "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.* at 570. In cases like those presented here, condemning an immature, vulnerable, and not-yet-fully-formed adolescent to die in prison is a constitutionally disproportionate punishment.

ARGUMENT

I. RESEARCH IN DEVELOPMENTAL PSYCHOLOGY AND NEUROSCIENCE DOCUMENTS JUVENILES' GREATER IMMATURITY, VULNERABILITY, AND CHANGEABILITY

In *Simmons*, this Court concluded that developmental differences between juveniles, including 16- and 17-year-old adolescents, and adults both diminish juveniles' blameworthiness for their criminal acts and enhance their prospects of change and reform.[3] Based on the scientific evidence presented by Simmons and his amici, the Court concluded that these differences between juvenile and adult offenders were "marked and well understood." 543 U.S. at 572. Continuing research in developmental psychology and neuroscience reinforces that conclusion, confirming that the three developmental characteristics of juveniles that *Simmons* identified—their immaturity, their vulnerability, and their changeability—render them, as a group, very different from adults. As this Court has recognized, those

---

[3] In this brief, we use the terms "juvenile" and "adolescent" to refer to individuals between the ages of 12 and 17. Science cannot, of course, draw bright lines precisely demarcating the boundaries between childhood, adolescence, and adulthood; the "qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Simmons*, 543 U.S. at 574. Likewise, younger adolescents differ in some respects from the 16- and 17-year-olds discussed in *Simmons*. Nonetheless, because those under 18, on the whole, share certain developmental characteristics that mitigate their culpability, and because "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood," this Court concluded in *Simmons* that it was appropriate to draw the line for death-eligibility at age 18. *Id.* The research discussed in this brief accordingly applies to adolescents under age 18, including older adolescents, unless otherwise noted.

differences are central to the calculus of culpability and the proportionality of punishment imposed on juvenile offenders.

A. Developmental Psychology And Social Science Research Confirms That Juveniles Are Less Mature, More Vulnerable, And More Changeable Than Adults

1. Juveniles have a lesser capacity for mature judgment

As this Court recognized in *Simmons*, adolescents have a significantly diminished capacity for mature judgment as compared to adults, and as a result are more likely to engage in risky behaviors. "[A]s any parent knows and as ... scientific and sociological studies ... tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'" 543 U.S. at 569 (quoting *Johnson* v. *Texas*, 509 U.S. 350, 367 (1993)).

As *Simmons* noted, "'adolescents are overrepresented statistically in virtually every category of reckless behavior.'" 543 U.S. at 569 (quoting Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339, 339 (1992)). Indeed, such behavior is "virtually a normative characteristic of adolescent development."[4] Juveniles' risky behavior frequently includes criminal activity; in

---

[4] Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339, 344 (1992).

fact, "numerous ... self-report studies have documented that it is statistically aberrant to refrain from crime during adolescence."[5] When crime rates are plotted against age, both the total number of offenses and frequency of offending are highest during adolescence.[6] Both violent crimes and less serious offenses "peak sharply" in late adolescence—around age 17[7]—and "drop precipitously in young adulthood."[8] Studies show a steep decrease in antisocial behavior after age 17, as adolescents mature.[9]

Adolescents' striking tendency to engage in risky and even illegal behavior stems at least in part from their lesser capacity for mature judgment. Research has shown that adolescents' decision-making differs

---

[5] Terrie E. Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 Psychol. Rev. 674, 685-686 (1993); *see also* Terrie E. Moffitt, *Natural Histories of Delinquency, in Cross-National Longitudinal Research on Human Development and Criminal Behavior* 3, 29 (Elmar G.M. Weitekamp & Hans-Jürgen Kerner eds., 1994).

[6] Moffitt, *Natural Histories of Delinquency*, *supra* note 5, at 4.

[7] Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior*, *supra* note 5, at 675; Moffitt, *Natural Histories of Delinquency*, *supra* note 5, at 4, 7; Arnett, *supra* note 4, at 343; *see also* DOJ Statistical Briefing Book, *available at* www.ojjdp.ncjrs.org/ojstatbb/crime/qa05301.asp?qaDate=20040801 *and* www.ojjdp.ncjrs.org/ojstatbb/crime/qa05305.asp?qaDate=20040801 (last visited July 20, 2009) (statistics showing that arrests for both serious violent crimes and property crimes peak in late adolescence).

[8] Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior*, *supra* note 5, at 675; Moffitt, *Natural Histories of Delinquency*, *supra* note 5, at 4, 7.

[9] Moffitt, *Natural Histories of Delinquency*, *supra* note 5, at 7.

from that of adults in several respects: adolescents are less able to control their impulses; they weigh the risks and rewards of their conduct differently; and they are less able to envision the future and apprehend the consequences of their actions. Even late adolescents who have developed general cognitive capacities similar to those of adults show deficits in these aspects of social and emotional maturity.

First, empirical research confirms that adolescents, including older adolescents, are more impulsive than adults and less able to exercise self-control. For example, one study of maturity of judgment found that adolescents, including 17-year-olds, scored significantly lower than adults on measures of "temperance," which included "impulse control" and "suppression of aggression."[10] A more recent study examining differences in impulsivity between ages 10 and 30, using both self-report and performance measures, similarly concluded that impulsivity declined throughout that period, with "gains in impulse control occur[ring] throughout adolescence" and into young adulthood.[11] "[T]he develop-

---

[10] Elizabeth Cauffman & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 Behav. Sci. & L. 741, 748-749, 754 & tbl. 4 (2000).

[11] Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 Developmental Psychol. 1764, 1774-1776 (2008); *see also* Adriana Galvan et al., *Risk Taking and the Adolescent Brain: Who is at Risk?*, 10 Developmental Sci. F8, F13 (2007) (in study of individuals aged 7 to 29, finding that impulse control continues to develop over the course of adolescence and early adulthood); Rotem Leshem & Joseph Glicksohn, *The Construct of Impulsivity Revisited*, 43 Personality & Individual Differences 681, 684-686 (2007) (reporting significant decline in

ing adolescent can only learn his or her way to fully developed control by experience. This process will probably not be completed until very late in the teen years.... [E]xpecting the experience-based ability to resist impulses ... to be fully formed prior to age eighteen or nineteen would seem on present evidence to be wishful thinking."[12]

Second, adolescents generally do not perceive and evaluate the costs and benefits of their actions in the same way adults do. "In general, adolescents use a risk-reward calculus that places relatively less weight on risk, in relation to reward, than that used by adults."[13] For example, one study comparing adolescent and adult decision-making found that when asked to evaluate hypothetical decisions, adolescents as old as 17 were less likely than adults to mention possible long-term consequences, to evaluate both risks and benefits,

---

impulsivity from ages 14-16 to 20-22 on two different impulsivity scales).

[12] Franklin E. Zimring, *Penal Proportionality for the Young Offender, in Youth on Trial* 271, 280, 282 (Thomas Grisso & Robert G. Schwartz eds., 2000).

[13] Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1012 (2003); *see also* Arnett, *supra* note 4, at 350-353 (summarizing evidence that adolescents' poor capacity for assessing probabilities plays a role in their reckless behavior); Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. Applied Developmental Psychol. 257, 265, 268 (2001); Susan G. Millstein & Bonnie L. Halpern-Felsher, *Perceptions of Risk and Vulnerability, in Adolescent Risk and Vulnerability* 15, 34-35 (Baruch Fischoff et al. eds., 2001).

and to examine possible alternative options.[14] A forthcoming study of performance on a gambling task likewise found that, in a group of more than 900 individuals aged 10 to 30, adolescents and adults displayed "significant differences" in their behavior relative to risk and reward: while adolescents "may attend more to the potential rewards of a risky decision than to the potential costs, adults tend to consider both."[15] The study concluded that decision-making with regard to risk and reward "improves throughout adolescence," likely "due not to cognitive maturation but to changes in affective processing"—that is, the ability to regulate responses to emotional and social influences.[16] Adolescents' less mature weighing of risk and reward may lead them to be more likely to engage in criminal activity, as well as other kinds of risk-taking.[17]

Finally, juveniles differ from adults in their ability to foresee and take into account the consequences of their behavior. By definition, adolescents have less life experience on which to draw, making it less likely that

---

[14] Halpern-Felsher & Cauffman, *supra* note 13, at 261, 264-270 (comparing 12th-graders with mean age of 17.5 to adults with mean age of 23). Even greater differences prevailed between adults and younger adolescents. *See id.*

[15] Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Test*, Developmental Psychol. 1, 11, 14 (forthcoming 2009).

[16] *Id.* at 14.

[17] Arnett, *supra* note 4, at 344, 350-351 (noting that adolescents' distortion of perceived risks and rewards may explain why half or more adolescents reported driving while intoxicated, engaging in sex without contraception, illegal drug use, or some form of minor criminal activity).

they will fully apprehend the potential negative consequences of their actions.[18] Moreover, adolescents are less able than adults to envision and plan for the future, a capacity still developing during adolescence.[19] The study of maturity of judgment, discussed above, found that adolescents' future orientation is weaker than adults': that study, which compared maturity of judgment in over 1,000 adolescents and adults, found that even 17-year-olds scored lower than adults on measures of "perspective," which encompassed "the ability to see short and long term consequences," as well as the ability to "take other people's perspectives into account."[20] Similarly, studies have shown that, among 15- to 17-year-olds, realism in thinking about the future increases with age, and that the skills required for future planning continue to develop until the early 20s.[21]

The ability to resist impulses and control emotions, the ability to gauge risks and benefits as an adult would, and the ability to envision the future consequences of one's actions—even in the face of environmental or peer pressures—are critical components of social and emotional maturity, necessary in order to

---

[18] *Id.* at 351-352.

[19] *See, e.g.*, Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 Developmental Rev. 1, 28-29 (1991); Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 Child Dev. 28, 30, 35-36 (2009).

[20] Cauffman & Steinberg, *supra* note 10, at 746, 748, 754 & tbl. 4 (comparing adults with 12th-graders with mean age of 17.5).

[21] Nurmi, *supra* note 19, at 28-29; *see also* Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, *supra* note 19, at 35-36.

make mature, fully considered decisions.[22] Empirical research confirms that adolescents—even older adolescents—have not fully developed these abilities and hence lack an adult's capacity for mature judgment.[23]

---

[22] Cauffman & Steinberg, *supra* note 10, at 741, 756 (finding a correlation between "responsibility," "temperance," and "perspective" and mature decision-making regarding antisocial or risky behavior).

[23] The dissent in *Simmons* criticized the American Psychological Association for allegedly having taken inconsistent positions regarding adolescent maturity in *Simmons* and in a previous case, *Hodgson* v. *Minnesota*, 497 U.S. 417 (1990), raising the question whether parental notification posed an undue burden on a minor girl's right to obtain an abortion. 543 U.S. at 617-618 (Scalia, J., dissenting). The Association's briefs in *Simmons* and *Hodgson*, however, addressed different questions and accordingly focused on distinct aspects of mature judgment. *Hodgson* addressed *competence* to make medical decisions, which can be made in a relatively unhurried manner in consultation with medical professionals, and thus focused on adolescents' *cognitive* abilities, noting that by mid-adolescence those abilities approximated those of adults. By contrast, the question in *Simmons*, as here, was the degree of adolescent *culpability* and (relatedly) adolescents' potential reformability when they commit criminal acts, acts that often result from impulsive and ill-considered choices driven by *psychosocial* immaturity. As discussed further below, cognitive capabilities mature before an adolescent has acquired the psychosocial capacities necessary for impulse control, self-government, and mature assessment of future consequences in the face of social and emotional pressures. Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, Am. Psychologist (forthcoming 2009) at 10; *see also* Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 Law & Hum. Behav. 221, 226-235 (1995). Moreover, because culpability and competence are distinct, adolescents' psychosocial immaturity mitigates their culpability (and enhances their prospects of reform) even if it does not render them incompetent for all purposes. *Cf. Tennard* v. *Dretke*, 542 U.S. 274, 288 (2004).

"[I]t is clear that important progress in the development of [social and emotional maturity] occurs sometime during late adolescence, and that these changes have a profound effect on the ability to make consistently mature decisions."[24]

It should be noted that the multiple abilities that contribute to mature judgment develop at different rates. Sound judgment requires both cognitive and social and emotional skills, but the former mature sooner than the latter. Studies of general cognitive capacity show an increase from pre-adolescence until about age 16, when gains in cognitive capacity begin to plateau.[25] As discussed above, however, social and emotional maturity continues to develop throughout adolescence. Thus, older adolescents (aged 16-17) might have logical reasoning skills that approximate those of adults, but

---

[24] Cauffman & Steinberg, *supra* note 10, at 756, 758 (finding that the most dramatic increase in psychosocial maturity occurs between the ages of 16 and 19); *see also* Halpern-Felsher & Cauffman, *supra* note 13, at 271 ("[I]mportant progress in the development of decision-making competence occurs sometime during late adolescence.").

[25] *See, e.g.*, Thomas Grisso et al., *Juveniles' Competence to Stand Trial*, 27 Law & Hum. Behav. 333, 343-344 (2003) (16- to 17-year-olds did not differ from 18- to 24-year-old adults but performed significantly better than 14- to 15-year-olds on test of basic cognitive abilities); Daniel P. Keating, *Cognitive and Brain Development*, *in Handbook of Adolescent Psychology* 45, 64 (Richard M. Lerner & Laurence Steinberg eds., 2004) (cognitive functions exhibited robust growth at earlier ages and began to approach the limits of growth in the 14- to 16-year-old group); Steinberg et al., *Are Adolescents Less Mature Than Adults?*, *supra* note 23, at 8-9 & fig. 2 (study showed almost linear increase in cognitive abilities from age 10-11 until age 16-17, when cognitive abilities began to plateau).

nonetheless lack the abilities to exercise self-restraint, to weigh risk and reward appropriately, and to envision the future that are just as critical to mature judgment.[26] Younger adolescents are even less capable of mature judgment, since they may be lacking not only those social and emotional skills but basic cognitive capabilities as well.

2. Juveniles are more vulnerable to negative external influences

As *Simmons* also recognized, "juveniles are more vulnerable ... to negative influences and outside pressures, including peer pressure." 543 U.S. at 569. Because of their developmental immaturity, adolescents are more susceptible than adults to the negative influences of their environment—and, indeed, their actions are shaped directly by family and peers in ways that adults' are not. "Adolescents are dependent on living circumstances of their parents and families and hence are vulnerable to the impact of conditions well beyond their control."[27] Both the family and the neighborhood in which an adolescent finds himself play a major role in juvenile delinquency.[28] Yet, precisely because of their

---

[26] Cauffman & Steinberg, *supra* note 10, at 743-745; *see also* Halpern-Felsher & Cauffman, *supra* note 13, at 264-271; Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann. Rev. Clinical Psychol. 47, 55-59 (2008).

[27] Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths, in Youth on Trial* 33, 47 (Thomas Grisso & Robert G. Schwartz eds., 2000).

[28] *Id.* at 47-48; Jeffrey Fagan, *Contexts of Choice by Adolescents in Criminal Events, in Youth on Trial* 371-394 (Thomas Grisso & Robert G. Schwartz eds., 2000).

legal minority, juveniles lack the freedom and autonomy to remove themselves from external influences that may exert pressure toward crime. Put simply, juveniles lack the control over themselves and over their lives that adults possess.

Juveniles not only lack control over their environment generally but are also less capable than adults of withstanding the negative influence of peer pressure—which is difficult for older juveniles to resist and even more difficult for younger juveniles to resist. Research has shown that susceptibility to peer influence, particularly in situations involving pressure to engage in antisocial behavior, increases between childhood and early adolescence, peaks at around age 14, and then declines slowly during the late adolescent years, with relatively little change after age 18.[29] One recent experimental study found that exposure to peers during a risk-taking task doubled the amount of risky behavior among mid-adolescents (with a mean age of 14), increased it by 50 percent among college undergraduates (with a mean age of 19), and had no impact at all among young adults.[30] "[T]he presence of peers makes adolescents

---

[29] Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 Developmental Psychol. 608, 612, 615-616 (1979); Laurence Steinberg & Susan B. Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 Child Dev. 841, 848 (1986); Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 38 (2008); *see also* Kristan Erickson et al., *A Social Process Model of Adolescent Deviance: Combining Social Control and Differential Association Perspectives*, 29 J. Youth & Adolescence 395, 420-421 (2000) (discussing peer influence on delinquency); Fagan, *supra* note 28, at 382-384 (discussing coercive effect of social context on adolescents).

[30] Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in*

and youth, but not adults, more likely to take risks and more likely to make risky decisions."[31]

Juveniles' lesser ability to resist peer influence affects their judgment and behavior both directly and indirectly, leading juveniles to take risks that adults might not. "In some contexts, adolescents might make choices in response to direct peer pressure, as when they are coerced to take risks that they might otherwise avoid. More indirectly, adolescents' desire for peer approval, and consequent fear of rejection, affect their choices even without direct coercion. The increased salience of peers in adolescence likely makes approval-seeking especially important in group situations."[32]

Adolescents are thus more likely than adults to alter their behavior in response to peer pressure—such as by engaging in antisocial behavior to conform to peer expectations or to achieve respect and status among their peers.[33] Juvenile crime is significantly correlated with exposure to delinquent peers.[34] Not surprisingly,

---

Adolescence and Adulthood: An Experimental Study, 41 Developmental Psychol. 625, 626-634 (2005); *see also* Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 Developmental Psychol. 1531, 1531 (2007) (describing Gardner and Steinberg study).

[31] Gardner & Steinberg, *supra* note 30, at 634.

[32] Scott & Steinberg, *supra* note 29, at 38-39; *see also* Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior*, *supra* note 5, at 686; Zimring, *supra* note 12, at 280-281.

[33] *See, e.g.*, Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior*, *supra* note 5, at 686.

[34] *See id.* at 687-688.

therefore, adolescents are much more likely than adults to commit crimes in groups.[35] "No matter the crime, if a teenager is the offender, he is usually not committing the offense alone."[36] Indeed, "[m]ost adolescent decisions to break the law take place on a social stage where the immediate pressure of peers is the real motive."[37] "A necessary condition for an adolescent to stay law-abiding is the ability to deflect or resist peer-pressure," a social skill that is not fully developed in adolescents.[38]

In short, as this Court has observed, "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings* v. *Oklahoma*, 455 U.S. 104, 115 (1982). Because juveniles' developmental immaturity and legal minority render them both more susceptible to, and less capable of escaping, negative external pressures, they "have a greater claim than adults to be forgiven" for the criminal acts that are the result of such pressures. *Simmons*, 543 U.S. at 570.

---

[35] Scott & Steinberg, *supra* note 29, at 39; *see also* Howard N. Snyder & Melissa Sickmund, National Center for Juvenile Justice, *Juvenile Offenders and Victims: 1999 National Report* 63 (1999) (in 1997, juveniles were twice as likely as adults to commit serious violent crimes in groups).

[36] Zimring, *supra* note 12, at 281; *see also* Joan McCord & Kevin P. Conway, *Co-Offending and Patterns of Juvenile Crime* 9 (Dec. 2005) (finding that group offenses outnumbered solo offenses by almost 2 to 1 for those under 13, by 1.5 to 1 for 13- to 15-year-olds, and by 1.2 to 1 for 16- to 17-year-olds).

[37] Zimring, *supra* note 12, at 280.

[38] *Id.* at 280-281.

3. Juveniles' unformed identity makes it less likely that their offenses evince a fixed bad character and more likely that they will reform

Finally, as *Simmons* recognized, juveniles differ from adults—and juvenile crime and culpability differ from adults'—because "the character of a juvenile is not as well formed as that of an adult," and "[t]he personality traits of juveniles are more transitory, less fixed." 543 U.S. at 570. Indeed, the defining quality of adolescence is that character is not yet fully formed. Adolescents are still in the process of forging an identity, a process that will not be complete at least until early adulthood.[39]

Given juveniles' relatively unformed identity, their transgressions do not necessarily indicate an entrenched "bad" character requiring permanent incapacitation. Instead, their actions often reflect the immaturity, impulsivity, and vulnerability that are the "signature qualities of youth" itself. *Simmons*, 543 U.S. at 570 (internal quotation marks omitted). And these characteristics of adolescence are transient. As this Court has recognized, for that reason, it is more

---

[39] *See, e.g.*, Alan S. Waterman, *Identity Development from Adolescence to Adulthood*, 18 Developmental Psychol. 341, 355 (1982) ("The most extensive advances in identity formation occur during the time spent in college."); Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court, in Youth on Trial* 9, 27 (Thomas Grisso & Robert G. Schwartz eds., 2000) ("[M]ost identity development takes place during the late teens and early twenties."); Scott & Steinberg, *supra* note 29, at 52 (coherent integration of identity does not occur until late adolescence or early adulthood; the final stages of this process often occur in the college years).

likely that juveniles' "character deficiencies will be reformed" as the "impetuousness and recklessness" of youth subside in adulthood. *Id.* (internal quotation marks omitted). In other words, it is "the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 573.

Indeed, youth mitigates culpability precisely because its "signature qualities" are transient: a youthful offender is not yet the person he will become in adulthood. *Simmons*, 543 U.S. at 570. Adolescent criminal conduct typically results from normative experimentation with risky behavior and not from deep-seated moral deficiency reflective of "bad" character.[40] For most juveniles, therefore, antisocial behavior is fleeting and will "'cease with maturity as individual identity becomes settled.'" *Simmons*, 543 U.S. at 570 (quoting Steinberg & Scott, *supra* note 13, at 1014). Only a small proportion of adolescents who experiment with illegal activities will develop an entrenched pattern of criminal behavior that persists into adulthood.[41] "[T]he vast majority of adolescents who engage in criminal or delinquent behavior desist from crime as they mature."[42]

---

[40] Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior*, *supra* note 5, at 686, 690; Steinberg & Scott, *supra* note 13, at 1015; *see also* Arnett, *supra* note 4, at 344, 366-367.

[41] Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior*, *supra* note 5, at 685-686; Steinberg & Scott, *supra* note 13, at 1014.

[42] Steinberg & Scott, *supra* note 13, at 1015; *see also* Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior*, *supra* note 5, at 685-686.

Moreover, juveniles' unformed selves mean that their future character and conduct cannot be reliably or accurately predicted. Researchers have consistently concluded that behavior can be identical in adolescents who will continue as criminal offenders through adulthood and those who will not.[43] When confronted with a delinquent adolescent, it is very difficult to predict accurately whether that individual will persist in criminal behavior or will desist from crime in adulthood, as the vast majority of delinquent adolescents do.

Indeed, as this Court concluded in *Simmons*, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." 543 U.S. at 573. For similar reasons, as the Court noted, psychiatrists generally will not diagnose antisocial personality disorder—also known as psychopathy or sociopathy—before the age of 18. *Id.* (citing American Psychiatric Association, *Diagnostic and Sta-*

---

[43] Edward P. Mulvey & Elizabeth Cauffman, *The Inherent Limits of Predicting School Violence*, 56 Am. Psychologist 797, 799 (2001) ("Assessing adolescents ... presents the formidable challenge of trying to capture a rapidly changing process with few trustworthy markers."); Thomas Grisso, *Double Jeopardy: Adolescent Offenders with Mental Disorders* 64-65 (2005) (discontinuity of disorders in adolescence creates "moving targets" for identification of mental disorders); John F. Edens et al., *Assessment of "Juvenile Psychopathy" and Its Association with Violence: A Critical Review*, 19 Behav. Sci. & L. 53, 59 (2001) (citing studies and noting difficulty of predicting juveniles' future behavior, such as antisocial conduct or psychopathy, because juveniles' social and emotional abilities are not fully developed).

tistical Manual of Mental Disorders 701-706 (4th ed. rev. 2000)).[44]

In sum, juveniles are still developing their character and identity, and it is likely that a juvenile offender will desist from crime in adulthood. *Simmons*, 543 U.S. at 570. Because juvenile crime is likely to be the product of the "signature qualities of youth," *id.*, there is no reliable way to determine that a juvenile's offenses are the result of an irredeemably corrupt character, and no reliable way to conclude that a person deserves to die in prison—without any opportunity to demonstrate change or reform—for an offense committed as a juvenile.

B. Juveniles' Psychosocial Immaturity Is Consistent With Emerging Research Regarding Brain Development

Emerging research shows that the brain is still developing during adolescence in ways consistent with adolescents' demonstrated psychosocial immaturity. Specifically, adolescent brains are not yet fully devel-

---

[44] The difficulty in predicting an adolescent's future character and conduct is particularly acute in attempting to identify individuals with psychopathy. Although some emerging research has suggested that some psychopathic traits might be more stable over time than previously thought, even these studies demonstrate that the predictive power of juvenile psychopathy assessments is quite weak. For example, one study found that if diagnostic scores on a measure of juvenile psychopathy were used to predict adult psychopathy, the prediction that juveniles who scored in the top 20 percent of psychopathic traits at age 13 would be psychopathic at age 24 would be wrong in 86 percent of cases. Donald R. Lynam et al., *Longitudinal Evidence That Psychopathy Scores in Early Adolescence Predict Adult Psychopathy*, 116 J. Abnormal Psychol. 155, 160, 162 (2007).

oped in regions related to risk evaluation, emotional regulation, and impulse control. "[O]ur emerging understanding of adolescent brain maturation ... suggests that brain systems responsible for logical reasoning and basic information processing mature earlier than those that undergird more advanced executive functions and the coordination of affect and cognition necessary for psychosocial maturity."[45] As discussed above, mature judgment requires both cognitive and psychosocial skills—as well as the ability to coordinate the two. Recent neurobiological research suggests that the brain systems that govern many aspects of social and emotional maturity, such as impulse control, weighing risks and rewards, planning ahead, and simultaneously considering multiple sources of information, as well as the coordination of emotion and cognition, continue to mature throughout adolescence.[46]

Advances in magnetic resonance imaging (MRI) have contributed to scientists' greater understanding of

---

[45] Steinberg et al., *Are Adolescents Less Mature Than Adults?*, *supra* note 23, at 10; *see also* Neir Eshel et al., *Neural Substrates of Choice Selection in Adults and Adolescents: Development of the Ventrolateral Prefrontal and Anterior Cingulate Cortices*, 45 Neuropsychologia 1270, 1270-1271 (2007) (prefrontal brain areas associated with higher-order cognition and emotional regulation are some of the last to mature; this lag in maturation in areas associated with reward values and control of behavior may explain why adolescents demonstrate poor decision-making); Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 Developmental Rev. 78, 93 (2008).

[46] *See, e.g.*, Eshel et al., *supra* note 45, at 1270-1271; Kathryn Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency*, 32 Law & Hum. Behav. 78, 79-80 (2008); Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity*, *supra* note 11, at 1765.

adolescent brain development. Research using MRI technology (available only since the 1990s) has allowed scientists to examine brain activity while an individual performs tasks involving speech, perception, reasoning, and decision-making. In addition, scientists have been able to study developmental changes in the structure of the brain during childhood and adolescence, by examining the same individuals over time at periodic intervals.[47]

The frontal lobes—and in particular the prefrontal cortex—of the brain play an essential part in higher-order cognitive functions. These regions of the brain are central to the process of planning and decision-making, including the evaluation of future consequences and the weighing of risk and reward.[48] They

---

[47] *See, e.g.*, Kenneth K. Kwong et al., *Dynamic Magnetic Resonance Imaging of Human Brain Activity During Primary Sensory Stimulation*, 89 Proc. Nat'l Acad. Sci. 5675, 5676-5678 (1992) (describing MRI mapping of brain activity); Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 Nature Neurosci. 861, 861 (1999) (describing study of 145 children and adolescents scanned up to five times over approximately ten years); Tomáš Paus, *Brain Development, in Handbook of Adolescent Psychology* 95, 97-98 (Richard M. Lerner & Laurence Steinberg eds., 2009); Linda Spear, *The Behavioral Neuroscience of Adolescence* 108-111 (forthcoming 2009).

[48] Antoine Bechara et al., *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 Brain 2189, 2198-2200 (2000) (patients with lesions in the prefrontal cortex suffered from impairments in the ability to make real-life decisions because of an insensitivity to future consequences, whether reward or punishment); Antoine Bechara et al., *Dissociation of Working Memory from Decision Making Within the Human Prefrontal Cortex*, 18 J. Neurosci. 428, 428, 434 (1998) (prefrontal cortex is necessary for decision-making in tasks involv-

are also essential to the ability to control emotions and inhibit impulses.[49] In short, fully developed and properly functioning frontal lobes play a critical role in a person's capacity to be a rational moral actor, capable of mature decision-making.

Yet, as MRI studies have shown, the prefrontal cortex is one of the last regions of the brain to mature.[50] During childhood and adolescence, the brain is maturing in at least two major ways relevant here. First, the brain undergoes myelination, the process through which the neural pathways connecting different parts of the brain become insulated with white fatty tissue called myelin.[51] That insulation "speeds ... neural signal transmission," making "communication between dif-

---

ing evaluation of risk and reward); Antonio R. Damasio & Steven W. Anderson, *The Frontal Lobes, in Clinical Neuropsychology* 404, 434 (Kenneth M. Heilman & Edward Valenstein eds., 4th ed. 2003) (one "hallmark of frontal lobe dysfunction is difficulty making decisions that are in the long-term best interests" of the individual); *see also* Elizabeth R. Sowell et al., In Vivo *Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neurosci. 859, 860 (1999) (frontal lobes are essential for planning and organization).

[49] *See, e.g.*, Elkhonon Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind* 23, 24, 141 (2001); *see also* B.J. Casey et al., *Structural and Functional Brain Development and its Relation to Cognitive Development*, 54 Biological Psychol. 241, 244-246 (2000).

[50] Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 Proc. Nat'l Acad. Sci. 8174, 8177 (2004); Casey et al., *supra* note 49, at 243; Spear, *supra* note 47, at 87-88.

[51] *See, e.g.*, Goldberg, *supra* note 49, at 144.

ferent parts of the brain faster and more reliable."[52] Myelination improves both neural connections within the prefrontal cortex itself and the neural connections between the prefrontal cortex and subcortical regions that are important for the processing of emotions and social information.[53]

Second, during childhood and adolescence, the brain is undergoing "pruning"—the paring away of unused synapses, leading to more efficient neural connections.[54] During adolescence, synaptic pruning is more characteristic of the prefrontal cortex than other brain regions, consistent with the observation that adolescence is a time of marked improvement in executive functions.[55]

Through myelination and pruning, the brain's frontal lobes change, with "white matter"—the tissue that

---

[52] *Id.*

[53] *See, e.g.*, Casey et al., *supra* note 49, at 245-246; Allan L. Reiss et al., *Brain Development, Gender and IQ in Children: A Volumetric Imaging Study*, 119 Brain 1763, 1770 (1996); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. Neurosci. 8819, 8828 (2001); Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, *supra* note 45, at 93-99.

[54] Casey et al., *supra* note 49, at 242-243; Gogtay et al., *supra* note 50, at 8175; Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction*, *supra* note 53, at 8828; Spear, *supra* note 47, at 81-90; Peter R. Huttenlocher, *Neural Plasticity: The Effects of Environment on the Development of the Cerebral Cortex* 41, 46-47, 52-58, 67 (2002).

[55] Eshel et al., *supra* note 45, at 1270-1271; Spear, *supra* note 47, at 87-90.

forms pathways among different parts of the brain—increasing, and "gray matter"—the neurons that are the building blocks of the brain—decreasing.[56] These changes in the brain's composition are thought to help the brain work faster and more efficiently, improving the "executive" functions of the frontal lobes, including impulse control and risk evaluation.[57] This shift in the brain's composition continues throughout adolescence; indeed, studies indicate that myelination continues into young adulthood.[58]

Although the precise underlying mechanisms of brain development continue to be studied, it is clear that, in late adolescence, important aspects of brain maturation remain incomplete, particularly those involving the brain's executive functions and the coordinated activity of regions involved in emotion and cognition.[59] In short, the part of the brain that is critical for control of impulses and emotions and mature, considered decision-making is still developing during adolescence, consistent with the demonstrated behavioral and psychosocial immaturity of juveniles.

---

[56] *See, e.g.*, Casey et al., *supra* note 49, at 243; Goldberg, *supra* note 49, at 27.

[57] *See, e.g.*, Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction*, *supra* note 53, at 8828; Casey et al., *supra* note 49, at 245-246; Reiss et al., *supra* note 53, at 1770.

[58] Huttenlocher, *supra* note 54, at 62; *see also* Giedd et al., *supra* note 47, at 861, 862 (longitudinal MRI study documenting an increase in white matter until age 22); Reiss et al., *supra* note 53, at 1770 (observing increase in white matter in prefrontal region of the brain throughout adolescence and into young adulthood).

[59] *See, e.g.*, Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, *supra* note 45, at 93-99.

II. Sentencing The Juvenile Offenders In These Cases To Die In Prison With No Opportunity to Demonstrate Reform Is A Disproportionate Punishment

As this Court recognized in *Simmons*, juveniles' immaturity, vulnerability, and changeability—while they in no way excuse juveniles' crimes—substantially lessen their culpability and undermine any justification for definitively ending their free lives. "The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" 543 U.S. at 570 (quoting *Thompson* v. *Oklahoma*, 487 U.S. 815, 835 (1988)). "Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Id.* And "[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.* For those reasons, "the death penalty is a disproportionate punishment for offenders under 18." *Id.* at 575. Those same mitigating characteristics support the conclusion that condemning a juvenile to die in prison for the offenses at issue here is a constitutionally disproportionate punishment.

This Court has held that, in light of death's finality and irreversibility, capital punishment warrants especially close scrutiny, and necessitates procedural protections not otherwise required, in order to ensure that its imposition complies with the Eighth Amendment's dictates. *See, e.g.*, *Harmelin* v. *Michigan*, 501 U.S. 957, 1006 (1991) (Kennedy, J., concurring in part and concurring in the judgment); *Eddings*, 455 U.S. at 110;

Lockett v. *Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion). Yet it has consistently held that "[t]he Eighth Amendment proportionality principle also applies to noncapital sentences," *Harmelin*, 501 U.S. at 997 (Kennedy, J., concurring in part and concurring in the judgment), and that the Eighth Amendment forbids any punishment that is "grossly disproportionate" to the crime, *id.* at 1001 (internal quotation marks omitted).

The Court has recognized that, under certain circumstances, the punishment of life in prison without parole may be grossly disproportionate in light of the gravity of the offense and the blameworthiness of the offender. *See Solem* v. *Helm*, 463 U.S. 277, 290-294 (1983). In particular, the *Solem* Court explained that it was appropriate to examine not merely the nature of the crime, but also the "culpability of the offender," including the offender's level of participation in the crime and his intent or motive in committing it. *Id.* at 293. The Court concluded that a sentence of life without parole was an unconstitutionally disproportionate punishment for a seventh non-violent felony committed by an adult offender. *See id.* at 303.

The Court has subsequently rejected Eighth Amendment challenges to a sentence of life without parole for possession by an adult of a large quantity of cocaine, *see Harmelin*, 501 U.S. at 994-996, and to lengthy sentences of terms of years with the possibility of eventual parole imposed on adults for repeated felony offenses that included serious or violent felonies, *see Lockyer* v. *Andrade*, 538 U.S. 63 (2003); *Ewing* v. *California*, 538 U.S. 11, 29-31 (2003) (plurality opinion). But it has reaffirmed *Solem*'s basic holding that the imposition of a sentence of imprisonment is constrained by a requirement of proportionality to the offense and the offender. *See Harmelin*, 501 U.S. at 997-998, 1001

(Kennedy, J., concurring in part and in the judgment); *Lockyer*, 538 U.S. at 72, 74; *Ewing*, 538 U.S. at 22-24. This Court has never yet had occasion to examine the constitutionality of the rare sentence at issue here: a sentence of life without the possibility of parole imposed on a juvenile for a non-homicide crime. But the principles articulated in this Court's Eighth Amendment jurisprudence support the conclusion that such a sentence is grossly disproportionate.

As an initial matter, while a sentence of death unquestionably differs from a sentence of imprisonment, imprisonment for life without the possibility of parole, like death, is in a very real sense final and irrevocable. It condemns the offender to live out his entire life and die in prison, precluding release regardless of anything he may do to redeem himself or demonstrate a changed character. Such a sentence is particularly harsh when imposed on a juvenile, who will spend his entire life in prison as a result of a crime committed as a minor, without ever experiencing adulthood—or the ability "to attain a mature understanding of his own humanity," *Simmons*, 543 U.S. at 574—as a free person.

The same characteristics of juveniles that this Court has already recognized mitigate their culpability and render a sentence of death an unconstitutionally disproportionate response to their offenses are relevant to the constitutionality of a sentence of life without parole. As discussed above, even older juveniles are significantly less capable than adults of mature, considered judgment. And the susceptibility of even late adolescents "to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" 543 U.S. at 570 (quoting *Thompson*, 487 U.S. at 835). Younger juveniles are still less able to make mature decisions, as

their basic cognitive capacities may not yet be fully developed—a particularly compelling factor mitigating culpability. *See Atkins* v. *Virginia*, 536 U.S. 304, 318 (2002). In short, because juveniles "have less capacity [than adults] to control their conduct and to think in long-range terms," juveniles "deserve less punishment" for their crimes. *Eddings*, 455 U.S. at 115 n.11 (internal quotation marks omitted).

Similarly, juveniles' vulnerability to negative influences that may be beyond their control "mean[s] juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Simmons*, 543 U.S. at 570. Because of their developmental immaturity, adolescents are more susceptible to the influence of the family and environment that produced them. Yet, because of their legal minority, juveniles "'lack the freedom that adults have to extricate themselves from a criminogenic setting.'" *Id.* at 569 (quoting Steinberg & Scott, *supra* note 13, at 1014). Juveniles' susceptibility to peer pressure also leads them to make unwise choices they would not be likely to make as adults and leads directly or indirectly to a significant proportion of juvenile crime. Because a key element of culpability is the notion that the criminal actor, exercising self-determination, made a choice to offend, juveniles' greater vulnerability to their environment and peers further mitigates their culpability. *Cf. Morissette* v. *United States*, 342 U.S. 246, 250 (1952) (culpability based on intentional conduct is rooted in our belief in the "freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil").

Finally, the transitory nature of adolescence itself, and the fact that juveniles' character is still being formed, means that juveniles' criminal conduct cannot

be morally equated with that of adults: "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Simmons*, 543 U.S. at 570.

The penological justifications for a sentence of life imprisonment without parole—like a sentence of death—are thus significantly weaker when applied to juveniles. The retributive purpose of such a punishment has substantially less force when applied to those "whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Simmons*, 543 U.S. at 571. Likewise, the same characteristics of juveniles that render them less culpable—their impulsivity, rash decision-making, biased attention to the anticipated immediate rewards of a choice rather than its potential longer-term costs, and lesser ability to consider and evaluate the future consequences of their actions—substantially weaken the deterrence justification for such punishment. *Id.*[60] And

---

[60] Indeed, empirical studies evaluating the deterrent effect of laws mandating that juvenile offenders be transferred to the adult criminal justice system for certain crimes have concluded that the threat of adult criminal sanctions had no measurable effect on juvenile crime. Simon I. Singer & David McDowall, *Criminalizing Delinquency: The Deterrent Effect of the New York Juvenile Offender Law*, 22 Law & Soc'y Rev. 521, 526-531 (1988) (comparing juvenile arrest statistics for four years prior to enactment of New York's transfer legislation with juvenile arrest statistics in the six-year period after enactment and finding little measurable impact on serious juvenile crime); Eric L. Jensen & Linda K. Metsger, *A*

while life without parole will unquestionably incapacitate a juvenile offender, life imprisonment with the possibility of parole would also serve that function, while allowing for the significant possibility that a juvenile will change and develop a moral character as an adult.

By contrast, condemning an offender to die in prison for a crime committed as a juvenile forecloses that possibility. As discussed above, and as *Simmons* recognized, adolescence is transitory, and adolescents change. Indeed, most adolescents who commit crimes will desist from criminal activity in adulthood. Because the adolescent self is not yet fully formed, there is no way reliably to conclude that an adolescent's crime is the expression of an entrenched and irredeemably malign character that might justify permanent incarceration, and no way to distinguish the hypothetical juvenile offender who is a hardened criminal from the offender whose crime is a product of the transient influences of adolescence itself. Sentencing a juvenile to die in prison, without any possibility of release, thus cannot rest on the conclusion that he is incapable of change or redemption. That simply cannot be said with any confidence of juveniles.

For all these reasons, sentencing an immature and less culpable juvenile to die in prison, particularly for the non-homicide offenses at issue here, is a grossly disproportionate punishment.

Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime, 40 Crime & Delinq. 96, 100-102 (1994) (comparing juvenile arrest statistics for the five-year periods before and after enactment of Idaho's transfer legislation and finding no deterrent effect on violent juvenile crime).

CONCLUSION

The judgments below should be reversed.

Respectfully submitted.

NATHALIE F.P. GILFOYLE
GENERAL COUNSEL
AMERICAN PSYCHOLOGICAL ASSOCIATION
750 First Street, N.E.
Washington, D.C. 20002
(202) 336-5500

DANIELLE SPINELLI
Counsel of Record
ANNE HARKAVY
SHIRLEY WOODWARD
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

JULY 2009

AMICUS CURIAE BRIEF

134 (15) (15)

Nos. 08-7412, 08-7621

Supreme Court, U.S.
FILED
JUL 22 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writs Of Certiorari To The District Court Of Appeal Of Florida, First District

BRIEF FOR AMNESTY INTERNATIONAL, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

CONSTANCE DE LA VEGA*
MICHELLE LEIGHTON
CENTER FOR LAW AND GLOBAL JUSTICE
UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW
2130 Fulton Street
San Francisco, CA 94117
415-422-2296

Counsel for Amici Curiae

**Counsel of Record*

NEIL A.F. POPOVIC
SHEPPARD MULLIN RICHTER & HAMPTON LLP
Four Embarcadero Center, 17th Fl.
San Francisco, CA 94111

005 4VYXTW

TC+TA

(Additional *Amici* And Counsel Listed On The Inside Cover.)

Additional *Amici*:

Amsterdam Bar Association

Bar Council of Hong Kong

Bar Human Rights Committee of England and Wales

Bar of Montreal

Center for Constitutional Rights

Columbia Law School Human Rights Clinic

Human Rights Advocates

Law Council of Australia

Law Society of England and Wales

Law Society of Ireland

Netherlands Bar Association

New Zealand Law Society

The Advocates for Human Rights

Union Internationale Des Avocats

Additional Counsel:

JULIAN P. KILLINGLEY
Solicitor of the Supreme Court (UK)
BIRMINGHAM CITY UNIVERSITY
SCHOOL OF LAW
Perry Barr
Birmingham, B42 2SU
United Kingdom

MARK GEORGE, Queen's Counsel
Garden Court North
22 Oxford Court
Manchester, M2 3WQ
United Kingdom

HANNAH L. GORMAN
Solicitor of the Supreme Court (UK)
CARTER MOORE
13 St. John Street
Manchester, M3 4DQ
United Kingdom

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. INTERNATIONAL LAW AND OPINION FORM A BASIS OF LAW AND GOVERNMENT IN THE UNITED STATES 4

II. INTERNATIONAL LAW PROHIBITING LIFE WITHOUT PAROLE FOR JUVENILE OFFENDERS IS INSTRUCTIVE TO THE COURT'S EIGHTH AMENDMENT ANALYSIS 9

A. The Prohibition Of Juvenile Life Without Parole Sentences Is *Jus Cogens* 10

1. The Prohibition is General or Customary International Law 13

2. There is Universal Acceptance that the Prohibition is Non-Derogable and Applies to All States 17

3. There is No Other Peremptory Norm Modifying the Prohibition of Juvenile Life Without Parole Sentences 23

B. The United States has been Found Out of Compliance with its Treaty Obligations in Allowing Life Without Parole Sentences 24

C. The Uniformity and Consistency of International Law and Practice Should Inform the Court's Eighth Amendment Analysis..... 30

III. THE LAW AND OPINIONS OF THE UNITED KINGDOM ARE PARTICULARLY RELEVANT TO THIS COURT'S EIGHTH AMENDMENT ANALYSIS..... 32

A. Historically, Juvenile Offenders Were Treated with More Leniency Than Adults in the United Kingdom 33

B. Sentencing Juveniles to Life Imprisonment without Parole is Prohibited by Law..... 36

IV. CONCLUSION..... 38

APPENDIX..... 1

TABLE OF AUTHORITIES

Page

Cases

Atkins v. Virginia,
536 U.S. 304 (2002) 8

Browning-Ferris Industries of Vermont, Inc., v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 33

Coker v. Georgia,
433 U.S. 584 ..... 7, 8, 30

Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988) 13

Enmund v. Florida,
458 U.S. 782 (1982) 7, 30

In re Estate of Ferdinand E. Marcos Human Rights Litigation,
978 F.2d 493 (9th Cir. 1992) 31

In re Estate of Ferdinand E. Marcos Human Rights Litigation,
25 F.3d 1467 (9th Cir. 1994) 31

Ferguson v. Georgia,
365 U.S. 570 (1961) 33

Gregg v. Georgia,
428 U.S. 153 (1976) 4

Grutter v. Bollinger,
539 U.S. 306 (2003) 4, 7

Lawrence v. Texas,
539 U.S. 558 (2003) 6, 32

Medellin v. Texas,
552 U.S. ___, 128 S. Ct. 1346 (2008) 25

Roper v. Simmons,
543 U.S. 551 (2005) ..... *passim.*

Siderman de Blake v. Republic of Argentina,
965 F.2d 699 (9th Cir. 1992) 12, 31

Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239 (2d Cir. 1996) 12

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 5

The Paquete Habana,
175 U.S. 677 (1900) 30

Thompson v. Oklahoma,
487 U.S. 815 (1988) 8

Trop v. Dulles,
356 U.S. 86 (1958) 7, 8, 30

United States v. Lee,
106 U.S. 196 (1882) 33

United States v. Mata-Ballesteros,
71 F.3d 754 (9th Cir. 1995) 31

White v. Paulson,
997 F. Supp. 1380 (E.D. Wash. 1998) 31

Ye v. Zemin,
383 F.3d 620 (7th Cir. 2004) 12

Constitution

Eighth Amendment ..... *passim.*

Foreign Statutes and Cases

France

Ordonnance of 2 February 1945
Articles 2 and 20-2 16

Germany

Jugendgerichtsgesetz (JGG) [Juvenile
Justice Act] Articles 5, 17, and 18 16

Italy

Codice Penale [Penal Code]
Articles 23, 65 and 98 16

United Kingdom

(Statutes)

Children Act of 1908, 8 Edw. 7, c. 67 33

Children and Young Person's Act 1933 34

Crime (Sentences) Act 1997
§ 28 37

Criminal Justice Act 2003 (c. 44) Schedule 21 37

Powers of Criminal Courts (Sentencing)
Act 2000 § 90 (Eng.) 35, 36

(Cases)

R v. Secretary of State for the Home Department Ex parte Venables, [1998]
A.C. 407 HL at 521 34

R v. W, [2003] 1 Cr. App. R. (S) 95, 504 35

International Court of Justice Cases

Anglo-Norwegian Fisheries (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 10) 14

Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), 1970 I.C.J. 4 (Feb. 5) 11

Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) 14

North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.) 1969 I.C.J. 3 (Feb. 20) .. 14

Rules

Supreme Court Rules Rule 37.2(a) 1

Treaties

American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (18 July 1978) 19

American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, Art. VII (1948) 19

Convention on the Elimination of Racial Discrimination, 660 U.N.T.S. 195, entered into force, January 4, 1969, ratified by the U.S., Oct. 21, 1994 ..... 7, 24

International Covenant on Civil and Political Rights. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXX1), 999 U.N.T.S. 171 (Dec. 16, 1966) 18

United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading

Treatment or Punishment, 1465 U.N.T.S. 113, entered into force, June 26, 1987, ratified by the United States, Oct. 21, 1994 24

Vienna Convention on the Law of Treaties, art. 53, 1155 U.N.T.S. 331, (May 23, 1969) 10

Organization of American States Cases

Juridical Conditions and Human Rights of the Child, Inter-Am. Ct. H.R., Advisory Opinion OC-17/02, Ser. A. No. 17, (Aug. 2002) 19

Michael Domingues v. United States, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, doc. 5 rev. 1, at 913 (2002)..... 19

United Nations Documents

Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture: United States of America*, U.N. Doc. CAT/USA/CO/2 (July 25, 2006)..... 27, 28

Committee on the Rights of the Child, Children's Rights in Juvenile Justice, General Comment No. 10, U.N. Doc. CRC/C/GC/10 (2007) 15, 18

Concluding Observations of the United States, U.N. Doc. CERD/C/USA/CO/6 (Feb. 6, 2008) .. 29

G.A. Res. 61/146, U.N. Doc. A/Res/61/146 (Dec. 19, 2006)..... 20

G.A. Res. 62/141, U.N. Doc. A/RES/62/141 (Dec. 18, 2007)..... 20

G.A. Res. 63/241, U.N. Doc. A/RES/63/241 (Dec. 24, 2008)..... 20

G.A. Res. 10/2, U.N. Doc. A/HRC/10/L.11, 11 (adopted March 25, 2009) 22

Proceedings of the Committee of the Whole, U.N. Doc. A/Conf. 39/11 (1968) 13

Rights of the Child, Comm'n on Human Rights 2005/44, U.N. Doc. E/CN.4/RES/2005/44 (April 20, 2005) 21

Rules for the Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, U.N. Doc. A/RES/45/113, Rule 2, (Dec. 14, 1990) 22

Standard Minimum Rules for the Administration of Juvenile Justice, G.A. Res. 40/33, 40 U.N. GAOR Supp. No. 53, U.N. Doc. A/40/53, Rule 17.1(b) (Nov. 29, 1985) 22

U.N. Human Rights Comm., Comments on the United States of America, U.N. Doc. CCPR/C/SR 2395 (2006) 19

United Nations Guidelines for the Prevention of Juvenile Delinquency, G.A. Res. 45/112, U.N. Doc. A/RES/45/112 (Dec. 14, 1990) 23

Other Authorities

Annino, Paolo, Rasmussen, David & Rice, Chelsea Boehme, App. II, Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to Nation, (July 14, 2009) 27

Blackmun, Harry A. *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39 (1994) 5

Brownlie, *Ian Principles of Public International Law*, 512–13 (Oxford 1990) 11

Charney, Jonathan I., *Universal International Law*, 87 Am. J. Int'l L. 529 (1993) 23

Cruz, Jonathan E., *Juvenile Waivers and the Effects of Proposition 21*, 1 Law & Soc'y Rev. 29 (2002) 17

de la Vega, Connie & Brown, Jennifer, *Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?* 32 U.S.F. L. Rev. 735 (1998) 10

de la Vega, Connie & Leighton, Michelle, *Sentencing our Children to Die in Prison*, 42 U.S.F. L. Rev. 983 (2008) 9

Human Rights Watch/Amnesty International, *The Rest of Their Lives* (2005 & 2009) 27

Human Rights Watch, *When I Die, They'll Send Me Home: Youth Sentenced to Life without Parole in California* (Jan. 2008) 27

Report of the Departmental Committee on the Treatment of Young Offenders, 1927 Cmd. 2831 34

Report of the Select Committee on Capital Punishment (1930) ¶ 189, 193 34

Restatement (Third) of the Foreign Relations Law of the United States
§ 102 ..... 10, 11

§ 111 31

Shelton, Dinah, *Normative Hierarchy in International Law*, 100 Am. J. Int'l L. 291 (2006) 18

Simpson, A. W. B., Report prepared for submission to the European Court of Human Rights in

Prem Singh v. United Kingdom, unreported, (21 Feb. 1996)..... 35

AMICUS BRIEF ON BEHALF OF APPELLANTS GRAHAM AND SULLIVAN

STATEMENT OF INTEREST

Amnesty International, Amsterdam Bar Association, Bar Council of Hong Kong, Bar Human Rights Committee of England and Wales, Bar of Montreal, Center for Constitutional Rights, Columbia Law School Human Rights Clinic, Human Rights Advocates, Law Council of Australia, Law Society of England and Wales, Law Society of Ireland, Netherlands Bar Association, New Zealand Law Society, The Advocates for Human Rights, and Union Internationale des Avocats hereby request that this Court consider the present brief pursuant to Sup. Ct. Rule 37.2(a) in support of Petitioners.[1] The interests of *amici* are described in detail in the Appendix.

Amici urge the Court to consider international law and opinion when applying the Eighth Amendment's clause prohibiting cruel and unusual punishments. International standards for sentencing juvenile offenders to life in prison without the possibility of parole bears directly on domestic compliance with international legal and societal norms. Those standards also provide an

---

[1] Counsel of record received timely notice of the intent to file this brief. Letters from all counsel consenting to its filing are being sent with this brief to the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

important indicator of evolving standards of decency, which in turn illuminate the contours of acceptable conduct under the Eighth Amendment. The United States is the only country in the world that does not comply with the norm against imposing life without parole sentences on juveniles under the age of 18. Prohibiting the sentence challenged in these cases would bring the United States into compliance with one of the most widely accepted human rights norms and with its international treaty obligations, and it would honor the Eighth Amendment principles that led this Court to strike down the juvenile death penalty in *Roper v. Simmons,* 543 U.S. 551 (2005).

SUMMARY OF ARGUMENT

International law and opinion have informed the law of the United States from the Declaration of Independence forward. The Founders were greatly influenced by international legal and social thought; and throughout the history of this country, courts have referred to international standards in considering the permissibility of practices under the Constitution. This is particularly true with respect to the Eighth Amendment's "cruel and unusual punishments" clause. Thus, *amici* consider the history of treatment of juveniles under international law and practice with respect to life without parole sentences to be of particular interest to this Court in carrying out its role under U.S. constitutional law.

Every other country in the world has rejected the practice of giving this sentence to offenders who

were under 18 at the time they committed a crime. Although a few countries technically permit the sentence, no known persons are actually serving the sentence outside the United States. In order to comply with international law, the few countries in which juveniles reportedly received such sentences either have changed their laws or given assurances that the juvenile offenders can apply for parole. The universal prohibition against such a sentence outside of the United States reflects not just customary international law, but a peremptory, non-derogable, *jus cogens* norm of international law. In addition, because of the historical relationship between the United Kingdom and the United States, the experience of England and Wales in prohibiting juvenile life without parole sentences can provide particular guidance to this Court.

Indeed, this Court referred to the international law regarding the juvenile death penalty in holding that sentence unconstitutional under the Eighth Amendment. *Roper,* 543 U.S. at 575-79. Many of the international standards referred to in *Roper* condemn equally the death penalty and life without parole sentences when applied to juveniles. Just as those standards supported the constitutional prohibition of the juvenile death penalty, so too they support the reversal of Mr. Graham and Mr. Sullivan's sentences.[2]

---

[2] At a minimum, since juvenile life without parole is considered similar to the juvenile death penalty under

ARGUMENT

I. INTERNATIONAL LAW AND OPINION FORM A BASIS OF LAW AND GOVERNMENT IN THE UNITED STATES

From the beginning, the laws of the United States have been informed and shaped by laws and opinions of other members of the international community. Indeed, the Declaration of Independence speaks to the relevance of other nations:

> When, in the course of human events, it becomes necessary for one people to dissolve the political bonds which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, *a decent respect to the opinions of mankind* requires that they should declare the causes which impel them to the separation.

The Declaration of Independence, para. 1 (U.S. 1776) (emphasis added). This Court has affirmed that history and noted that:

---

international law, this Court should carefully consider the imposition of such a serious sentence without the protections enunciated by this Court in the context of the application of the death penalty, as occurred in the case of Mr. Graham. *See Gregg v. Georgia*, 428 U.S. 153 (1976).

> For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. . . . It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.

Sosa v. Alvarez-Machain, 542 U.S. 692, 729-730 (2004).

In urging courts to afford the "decent respect to the opinions of mankind" intended by the Founders, Justice Blackmun has explained that:

> [T]he early architects of our Nation understood that the customs of nations – the global opinion of mankind – would be binding upon the newly forged union. John Jay, the first Chief Justice of the United States, observed . . . that the United States "had, by taking a place among the nations of the earth, become amenable to the laws of nations."

Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39 (1994) (citation and footnotes omitted).

Thomas Jefferson, the principal drafter of the Declaration of Independence, had a keen appreciation for international opinion and law. Accordingly, the Declaration of Independence

reflects a broad understanding of eighteenth century political thought, and was greatly influenced by French, English, and Scottish Enlightenment philosophers and their understanding of ancient Greek democracy and the Roman Republic.

Similarly, John Adams was sensitive to, and familiar with, international opinion as it related to the Nation's laws and institutions. During his time as Minister to Great Britain, Adams wrote a multi-volume defense of the new Constitution and its form of government. In it he demonstrates his deep knowledge of various forms of governments and the necessity of selecting the best the world had to offer to create a better government. *See* John Adams, *A Defence of the Constitutions of Government of the United States of America,* Preface, Grosvenor Square (Jan. 1, 1797), http://www.constitution.org/jadams/ja1_00.htm.

Consistent with the approach of the Founders, this Court has recognized the relevance of international norms to the evolution of societal norms and to the scope and content of Constitutional rights—irrespective of the precise legal status of the norms at issue. In *Roper*, which abolished juvenile executions, the Court considered not only the evolution of international law, but also the evolution of the practice in the community of nations of referring to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." *Id.* at 575-78; *see also, e.g., Lawrence v. Texas*, 539

U.S. 558, 576-77 (2003) (holding Texas's law prohibiting sodomy unconstitutional when other nations "have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct," a right which "has been accepted as an integral part of human freedom in many other countries"); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsberg, J., concurring) (referencing provisions in International Convention on the Elimination of All Forms of Racial Discrimination as basis for holding law school's affirmative action program did not violate Equal Protection Clause); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (reversing death penalty for felony murder conviction, referencing that practice was unknown, abolished or severely restricted in other countries); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (taking into account "the climate of international opinion concerning the acceptability of a particular punishment," noting it was "not irrelevant here that out of 60 major nations in the word . . . only 3 retained the death penalty for rape where death did not ensue").

The very constitutional provision at issue in this case—the Eighth Amendment's prohibition on "cruel and unusual punishments inflicted"—traces its origin directly to the laws of another nation. The foundation for the phrase "cruel and unusual" stems from the "Anglo-American tradition of criminal justice." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). The phrase was taken directly from the English Declaration of Rights of 1688, and the principle came from the Magna Carta. *Id.* For this reason,

the Amendment's meaning must be drawn from the "evolving standards of decency that mark the progress of a maturing society." *Id.* at 101.

This Court has a proud history of looking to the standards of the international community, in particular in determining the contours of the Eighth Amendment's cruel and unusual punishments clause. *See, e.g., Roper,* 543 U.S., at 575-78 (noting that international law and the laws of other countries, including the United Kingdom, prohibit the juvenile death penalty); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (considering international community's rejection of death penalty for persons with mental retardation); *Trop*, 356 U.S. at 102 (noting "virtual unanimity" within international community that denationalization constitutes cruel and unusual punishment); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion) (considering abolition of juvenile death penalty by leading nations in Western Europe and among countries sharing our Anglo-American heritage), *recognized in Roper,* 543 U.S. at 575; *see also Coker,* 433 U.S. at 596 (60 countries surveyed where only 3 retained death penalty for rape in non-homicide cases). To view the evolving standards of decency in an isolated and insular domestic environment would be contrary to all that the Founders considered essential to joining the ranks of nations.[3]

---

[3] International law also informs state and local jurisprudence in the United States. *See* Human Rights in State Courts, Opportunity Agenda, at 10-38,

The Founders sought to elicit the very best from themselves, fellow citizens and all of humankind in creating the United States. They were not as concerned with the source of a just principle as they were with its value to a just and honorable country. Similarly, this Court should consider international standards and recognize that sentencing juvenile offenders to die in prison does not have a place in an evolved society. Surely children in the United States are not worse, less human, or less deserving than children in the rest of the world.

II. INTERNATIONAL LAW PROHIBITING LIFE WITHOUT PAROLE FOR JUVENILE OFFENDERS IS INSTRUCTIVE TO THE COURT'S EIGHTH AMENDMENT ANALYSIS

The practice of sentencing juvenile offenders to life imprisonment without the possibility of parole has been rejected by every nation in the world except the United States. Only the United States still imposes the sentence. Connie de la Vega & Michelle Leighton, *Sentencing our Children to Die in Prison,* 42 U.S.F. L. Rev. 983, 989-1007 (2008) (hereinafter "*Sentencing our Children to Die*"). Indeed, the prohibition against the sentence of life without parole for juveniles is part of customary international law, and the elevation of this norm to the status of *jus cogens* by the

---

http://opportunityagenda.org/category/tags/human-rights (listing 35 states in which international human rights law considered persuasive in state court decisions).

worldwide condemnation of this practice and the expectation for all nations to comply, should provide guidance to this Court in interpreting the Constitution.[4] Moreover, the consistency and uniformity of international law and opinion against the challenged sentence should weigh heavily in this Court's determination that the juvenile life sentence without parole is inconsistent with the Eighth Amendment's prohibition of cruel and unusual punishments.

A. The Prohibition Of Juvenile Life Without Parole Sentences Is *Jus Cogens*

Under article 53 of the Vienna Convention on the Law of Treaties, a *jus cogens* norm of international law is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, art. 53, 1155 U.N.T.S. 331, (May 23, 1969) (hereinafter "Vienna Convention").[5] The Restatement (Third) of the

---

[4] As discussed below, imposition of this sentence by courts in Florida and elsewhere in the country renders the United States out of compliance with its international treaty obligations.

[5] Although the United States has not ratified the Vienna Convention, it nonetheless accepts the treaty's principles as binding law—i.e., part of United States law. *See, e.g.*, Restatement § 102; Connie de la Vega & Jennifer Brown, *Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?* 32 U.S.F. L. Rev. 735, 754,

Foreign Relations Law of the United States, which explicates the content and status of international law *as United States law,* agrees with this standard. Restatement (Third) of the Foreign Relations Law of the United States § 102, cmt. k (hereinafter "Restatement").

The doctrine of *jus cogens* focuses on the supremacy of certain international law norms in regulating state practice. Ian Brownlie, Principles of Public International Law 512–13 (Oxford 1990) (hereinafter "Brownlie"); *Barcelona Traction, Light and Power Company, Limited* (Belg. v. Spain), 1970 I.C.J. 4, at paras. 33–34 (Feb. 5). These are rules originally derived from treaties and/or state practice, comprising customary international law (which the Restatement describes as resulting "from a general and consistent practice of states followed by them from a sense of legal obligation" Restatement §102(2)). However, unlike general customary law, *jus cogens*, also called peremptory norms, have attained a higher status in international law such that the global community of nations expects all states to comply, and none to derogate, regardless of consent, express or implied.

According to the Restatement, *jus cogens* "rules prevail over and invalidate international agreements and other rules of international law in conflict with them." *Id.*, cmt. k. The Ninth Circuit has explained that:

759-62 (1998) (explaining that United States is bound by *jus cogens*).

> While *jus cogens* and customary international law are related, they differ in one important respect. Customary international law, like international law defined by treaties and other international agreements, rests on the consent of states. A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm, see Restatement § 102 Comment d, just as a state that is not party to an international agreement is not bound by the terms of that agreement .... In contrast, *jus cogens* "embraces customary laws considered binding on all nations" and "is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations," [citations omitted].

Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992) (recognizing torture as *jus cogens* violation).

While commentators may disagree on the exact scope of all *jus cogens* norms, there is agreement about their existence as an established part of international law. *Id.*; *see also Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 244-45 (2d Cir. 1996) (discussing *jus cogens* norms as they relate to states' sovereign immunity); *Ye v. Zemin*, 383 F.3d 620, 625-27 (7th

Cir. 2004) (discussing *jus cogens* norms—"a special type of customary international law"—with regard to head of state immunity). Courts have also recognized that *jus cogens* norms may inform U.S. jurisprudence. *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 940-41 (D.C. Cir. 1988) (dicta) ("[basic norms of international law] may well restrain our government in the same way that the Constitution restrains it"). The norm is said to be established where there is acceptance and recognition by a "large majority" of states, even if over dissent by a very small number of states. Restatement §102 & rptr. n. 6 (citing Report of the Proceedings of the Committee of the Whole, at 471-72, U.N. Doc.A/Conf. 39/11 (1968)).

A *jus cogens* norm must fulfill three basic requirements: 1) it is general or customary international law; 2) it is accepted by a large majority of states as non-derogable; and 3) it has not been modified by a new norm of the same status. As discussed below, the prohibition against life without parole sentences for offenders under the age of 18 when they committed their crime satisfies these requirements. Thus, the prohibition is *jus cogens,* and the community of nations expects the United States to comply.

1. The Prohibition is General or Customary International Law

General or customary international law requires widespread, constant, and uniform state practice compelled by a sense of legal obligation over a sufficiently long time period,

notwithstanding a few uncertainties or contradictions in practice during this time. *Anglo-Norwegian Fisheries* (U.K. v. Nor.), 1951 I.C.J. 116, 138–39 (Dec. 10) (discussing general international law applicable to delimitation of Norwegian fisheries zone); *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, at 98, para. 186 (June 27) (to deduce existence of customary rules, it is "sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule").

Furthermore, "a very widespread and representative participation in [a] convention might suffice of itself" to evidence the attainment of customary international law, provided it included participation from "States whose interests were specially affected." *North Sea Continental Shelf Cases* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, paras. 73–74 (Feb. 20) ("although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general

recognition that a rule of law or legal obligation is involved"). This definition is accepted by most legal scholars in and outside the United States. *See, e.g.*, Restatement § 102; Henry J. Steiner, Philip Alston & Ryan Goodman, International Human Rights in Context 74-78 (Oxford 2008).

The prohibition against sentencing child offenders to life without parole meets these criteria. It is a treaty rule and customary practice, followed by all countries as a legal obligation, except the United States.[6] As this Court noted in *Roper*, there is near-universal ratification of the U.N. Convention on the Rights of the Child ("CRC") which, in article 37, expressly prohibits the sentence for juveniles along with the death penalty. This is because imposing such sentences on juvenile offenders contravenes society's notion of fairness and the shared legal responsibility to protect and promote child development. The Committee on the Rights of the Child, the treaty body that monitors compliance with the CRC, has noted that customary international law recognizes that the special characteristics of children should be considered when imposing sentences in the criminal justice system. Committee on the Rights

---

[6] The United States and Somalia are the only two countries not party to the CRC. *See* OHCHR, Status of the Principal International Human Rights Treaties, *at* http://www.unhchr.ch/pdf/report.pdf. Lacking a functioning government, Somalia could not feasibly have ratified the CRC, *see, e.g.*, U.S. Department of State report on Somalia, http://www.state.gov/r/pa/ei/bgn/2863.htm, leaving the United States as the only country that could have but has not ratified the treaty.

of the Child, Children's Rights in Juvenile Justice, General Comment No. 10, paras. 10-11, U.N. Doc CRC/C/GC/10 (2007). Indeed, the LWOP sentence penalizes child offenders more than adults because the child, by virtue of young age, will likely serve a longer sentence than an adult for the same crime.

Moreover, all functioning states besides the United States comply with the legal obligation, including those whose interests are specially affected. Other states that had used the sentence have abolished it. *Sentencing our Children to Die, supra*, at 989. The United States is now responsible for 100% of all child offenders serving this sentence.

While the CRC entered into force in 1992, very few countries have *ever* imposed life sentences on child offenders. *Sentencing our Children to Die, supra*, at 989-1007. For example, in Germany, the maximum sentence for youth under 18 for any crime is 10 years (Arts. 5, 17 & 18 of the Jugendgerichtsgesetz (JGG), Juvenile Justice Act, German penal code of 1923, consolidated version of 12/17/2008, www.gesetze-im-internet.de/bundesrecht/jgg/gesamt.pdf); in Italy it is 24 years (Arts. 23, 65 & 98 of the penal code, *codice penale*, http://dbase.ipzs.it/cgi-free/db2www/notai/arti.mac/input?swpag=12E); and in France it is 16 to 20 years for juveniles under age 16 (Arts. 2 & 20-2, Ordonnance of 2 Feb. 1945, http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006069158&dateTexte=20090701).

Most governments either have expressly prohibited, never allowed, or do not impose such sentences on child offenders, because it violates the principles of child development and protection established through national standards and international human rights law. *Sentencing our Children to Die, supra*, at 989-90. Of the remaining countries besides the United States that have laws that could permit the sentencing of child offenders to life without parole, in ten (Antigua and Barbuda, Argentina, Australia, Belize, Brunei, Cuba, Dominica, Saint Vincent and the Grenadines, the Solomon Islands, and Sri Lanka) there are no known cases where the sentence has been imposed. *Id.* at 990. Even in the United States, the sentence was not used on a large scale until the 1990s when crime reached record levels. *See* P. Griffin, et al., Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions, National Center for Juvenile Justice (1998), www.ncjrs.org/pdffiles/172836.pdf. Before 1992, the sentence had rarely been imposed. Jonathan E. Cruz, *Juvenile Waivers and the Effects of Proposition 21*, 1 Law & Soc'y Rev. 29, 38 (2002). Thus, the norm prohibiting the juvenile life without parole sentence is widespread, constant and uniform—and it predates formal codification in the CRC.

2. There is Universal Acceptance that the Prohibition is Non-Derogable and Applies to All States

Whether a rule of international law has achieved peremptory status depends on whether

nations agree that the rule is legally binding on *all* states. *See* Dinah Shelton, *Normative Hierarchy in International Law*, 100 Am. J. Int'l L. 291, 323 (2006); Brownlie, *supra*, at 512–13. It is therefore important to evaluate the legal expectations of the community of nations and their practice in conformity with those expectations. Treaties and UN resolutions can provide evidence of such expectations. Rosalyn Higgins, Problems and Process: International Law and How We Use It 22 (Oxford 1994).

Virtually all nations have reconfirmed their expectation that every country comply with the prohibition: treaty bodies have clarified that the sentence is prohibited by law, even for the United States; the community of nations has condemned the practice and called for its abolition by any nation that would continue its use; and all other countries that had used the sentence have stopped.

In early 2007, the Committee on the Rights of the Child reiterated that CRC article 37 prohibits the death penalty and life without parole in a General Comment. General Comment No. 10, at para 27.

The prohibition has also been recognized as an obligation under the International Covenant on Civil and Political Rights. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXXI), 999 U.N.T.S. 171 (Dec. 16, 1966) (hereinafter "ICCPR"). In relation to articles 7 (cruel and unusual punishment) and 24 (treatment of children), the Human Rights Committee "is of

the view that sentencing children to life sentence without parole is of itself not in compliance with article 24 (1) of the Covenant. (articles 7 and 24)." U.N. Human Rights Comm., Comments on the United States of America, U.N. Doc. CCPR/C/SR 2395 at para 34 (2006) (hereinafter "Comments on the United States").

Prohibition of the juvenile death penalty and juvenile sentences of life without parole is also required to ensure the rights to humane treatment, dignity and personal liberty of children that are codified in the *corpus juris* of the Organization of American States, of which the United States is a member. *See* American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, Art. VII (1948) (establishing right of "all children . . . to special protection, care and aid"); American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, art. 19 (18 July 1978) ("Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state"); *Michael Domingues v. United States*, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, doc. 5 rev. 1, at 913, para. 83 (2002) (Art. 19 of American Convention and Art. VII of American Declaration reflect "the broadly-recognized international obligation of states to provide enhanced protection to children"); *Juridical Conditions and Human Rights of the Child,* Inter-Am. Ct. H.R., Advisory Opinion OC-17/02, Ser. A. No. 17, para. 37 (Aug. 2002) ("Deprivation of liberty of children shall be applied as a measure of last resort and for the

minimum necessary period, and shall be limited to strictly exceptional cases.").

Beyond the rule's clarity in treaty law, a near universal consensus has coalesced over the past fifteen years, even accelerated since 2006, that the sentence must be legally abolished. Myriad United Nations resolutions have passed by consensus or, upon vote, by every country represented except the United States. Every year since 2006, the United Nations General Assembly has adopted in its Rights of the Child resolution a call for the immediate abrogation of the juvenile LWOP sentence by law and practice in any country applying the penalty. For example, by a vote of 185 to one (the United States was the lone dissenter) the General Assembly adopted a resolution on December 19, 2006, calling upon nations to "abolish by law, as soon as possible, the death penalty and life imprisonment without possibility of release for those under the age of 18 years at the time of the commission of the offense." Rights of the Child, G.A. Res. 61/146, U.N. Doc. A/Res/61/146, para. 31(a) (Dec. 19, 2006). A similar resolution was adopted by a vote of 183 countries to one in December of 2007 (only the United States voted against), G.A. Res. 62/141, U.N. Doc. A/RES/62/141, para 36(a) (Dec. 18, 2007), and again in 2008 (the United States was the only vote against). G.A. Res. 63/241, U.N. Doc. A/RES/63/241, para 43(a), (Dec. 24, 2008).

The United Nations Human Rights Council included the prohibition in its first substantive resolution on the Rights of the Child, Rights of the

Child, A/HRC/7/RES/29, para. 30(a) (2008), along with prohibition of the death penalty for offenders under the age of 18 at the time of the crime.[7] In 2009 the Council again urged "States to ensure that, under their legislation and practice, neither capital punishment nor life imprisonment without the possibility of release is imposed for offences committed by persons under 18 years of age." Human rights in the administration of justice, in particular of children and juvenile justice, Res. 10/2, U.N. Doc. A/HRC/10/L.11, ¶ 11 (adopted Mar. 25, 2009). In 2005, the U.N. Commission on Human Rights (predecessor to the Council) called for governments to prohibit the juvenile LWOP sentence along with the juvenile death penalty. Rights of the Child, Comm'n on Human Rights 2005/44, U.N. Doc. E/CN.4/RES/2005/44, para. 27(c) (April 20, 2005). This resolution emerged from a series of pronouncements from the Commission, from 1997 through 2004, emphasizing the need for the global community to comply with the principle that depriving juveniles of their liberty should only be a measure of last resort and for the shortest appropriate time. *Sentencing our Children to Die, supra*, at 1017-18, n.182.

These resolutions followed many years of other pronouncements calling for limited juvenile incarceration. In 1985, for example, the General Assembly adopted the United Nations Standard Minimum Rules for the Administration of Juvenile

---

[7] The Commission on Human Rights, created in 1948, was replaced by the Human Rights Council in 2005 which began adopting thematic resolutions in 2007.

Justice, reiterating that confinement shall be imposed only after careful consideration and for the shortest period possible. Standard Minimum Rules for the Administration of Juvenile Justice, G.A. Res. 40/33, 40 U.N. GAOR Supp. No. 53, at 207, U.N. Doc. A/40/53, Rule 17.1(b) (Nov. 29, 1985). In 1990, the General Assembly passed two other resolutions in support. *See* U.N. Rules for the Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, U.N. Doc. A/RES/45/113, Rule 2, (Dec. 14, 1990) (emphasizing imprisonment as a last resort and for the shortest time possible); United Nations Guidelines for the Prevention of Juvenile Delinquency, G.A. Res. 45/112, U.N. Doc. A/RES/45/112, para. 46, (Dec. 14, 1990).

Moreover, as noted above, all other countries that had maintained a JLWOP sentence have ended the practice in accordance with their treaty and international human rights obligations. *Sentencing our Children to Die*, *supra*, at 996-1004 (e.g., Tanzania committed to allow parole for the one person potentially serving the sentence and to clarify its laws to prohibit it; Israel clarified that parole petitions may be reviewed by its High Court; and South Africa clarified that such sentences are not permitted). That the few remaining countries besides the United States that potentially had juvenile offenders serving such a sentence clarified that they allow for parole hearings in accordance with the international legal norm is further evidence that countries agree no derogation is permitted. All nations are expected to respect the norm, regardless

of objection (even persistent) by a particular country.[8] Restatement § 102 & cmt. k.

3. There is No Other Peremptory Norm Modifying the Prohibition of Juvenile Life Without Parole Sentences

"[A] peremptory norm is subject to modification only by a subsequent norm of international law having the same character." Restatement § 102 & cmt. k. There is no other norm that contradicts the current norm. Rather, as discussed above, the trend is to the contrary, as governments call for abolition of the challenged sentence in law and deed. The prohibition against JLWOP thus satisfies the three requirements for *jus cogens* status.

The norm is international law, and it should inform this Court's analysis of the challenged sentence under the Eighth Amendment.

---

[8] *Amici* do not imply that the United States has been a persistent objector, since the doctrine requires that a state object clearly, consistently, and affirmatively both as the norm is in its formative stages and continually as it develops. Jonathan I. Charney, *Universal International Law*, 87 Am. J. Int'l L. 529, 537 (1993). The United States did not start objecting until this past decade, well past the norm's formative stage. Moreover, in the context of *jus cogens*, there is no exception for persistent objectors.

B. The United States has been Found Out of Compliance with its Treaty Obligations in Allowing Life Without Parole Sentences

In determining whether the United States Constitution permits the challenged sentence, the Court should also consider the mandates of the Supremacy Clause, which provides that "all Treaties made ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. art. VI, cl. 2.

The United States is now out of compliance with several human rights treaties to which it is a legal party: the ICCPR, *supra*; the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 113, *entered into force,* June 26, 1987, ratified by the United States, Oct. 21, 1994, and the Convention on the Elimination of Racial Discrimination, 660 U.N.T.S. 195, *entered into force,* Jan. 4, 1969, ratified by the United States, Oct. 21, 1994 (hereinafter "CERD").

The treaty bodies that monitor compliance with these treaties all have raised concerns about and/or found the United States specifically out of compliance with its obligations in allowing life without parole sentences for juveniles. Florida, like other states, has an obligation to ensure that its criminal punishments comply with and help the United States meet its international treaty obligations.

As Justice Stevens has stated, "[o]ne consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation," *Medellin v. Texas*, 552 U.S. ___, 128 S. Ct. 1346, 1374 (2008) (concurring opinion), and, in a follow-up opinion emphasized the point, "I wrote separately to make clear my view that Texas retained the authority—and, indeed, the duty as a matter of international law—to remedy the potentially significant breach of the United States' treaty obligations...." *Medellin v. Texas*, 552 U.S.___, 129 S. Ct. 360, 362 (2008) (Stevens, J., dissenting). Compliance with international human rights standards and with treaty obligations should be of particular concern to states, as they carry a large part of the burden to implement obligations related to sentencing and detention.

The express provisions of international treaties and the findings of treaty bodies should be highly relevant to this Court's consideration under the Eighth Amendment, much as it was in *Roper*, 543 U.S. at 576. In *Roper*, the Court examined the CRC's express prohibition of the death penalty and the fact that "parallel prohibitions are contained in other significant international covenants." *Id.* The case for the Court's consideration here, however, is *even stronger* because the treaty bodies charged with overseeing the main treaties that address criminal sentencing to which the United States is a party have specifically found the United States to be out of compliance by allowing juvenile life without parole sentences.

In 2006, the Human Rights Committee, oversight authority for the ICCPR, determined that allowing the sentence contravenes article 24(1), which states that every child shall have "the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State," and article 7, which prohibits cruel and unusual punishment. The Human Rights Committee concluded that the United States should ensure that no child offender be given the sentence. Comments on the United States, *supra*, para. 34.

The Committee noted the reservation of the United States to other articles in the treaty which states that:

> The United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2 (b) and 3 of article 10 and paragraph 4 of article 14.

See Office of the United Nations High Comm'r for Human Rights, ICCPR, http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm. This did not prevent the Committee from finding the United States out of compliance with article 24(1) (noted above), and from registering its concern that the application of the sentence was not imposed only in "exceptional circumstances." *Id.*

The United States currently has more than 2,500 juvenile offenders serving the sentence.

Many of those are for convictions that could not be deemed the worst crimes: an estimated 26% of juvenile offenders are serving JLWOP for felony murder, in which the juvenile was not the person who killed the victim. Human Rights Watch/Amnesty International, *The Rest of Their Lives*, at 27 (2005), http://www.hrw.org/en/reports/2005/10/11/rest-their-lives-0; and 2009 Update Report, http://www.hrw.org/sites/default/files/related_material/JLWOP_Table_May_7_2009.pdf.

In 45 percent of California cases surveyed by Human Rights Watch, youth sentenced to life without parole were convicted for their role in aiding and abetting or participating in a felony. Human Rights Watch, *When I Die, They'll Send Me Home: Youth Sentenced to Life without Parole in California,* at 21 (Jan. 2008), http://www.hrw.org/reports/2008/us0108/. A significant number of those cases involved an attempted crime gone awry—a tragically botched robbery attempt, for example—rather than premeditated murder. Other youths were given the sentence for lesser crimes, as exemplified most poignantly by the cases of petitioners Graham and Sullivan now before this Court.

In significant contrast to the reservation's promise to try children as adults only in "exceptional cases," there are presently some 2,500 juveniles serving life without parole sentences in the United States, including approximately 302 in Florida. *See* Paolo Annino, David Rasmussen, Chelsea Boehme Rice, App. II, Juvenile Life

without Parole for Non-Homicide Offenses: Florida Compared to Nation, (July 14, 2009), http://www.law.fsu.edu/faculty/profiles/annino/Report_JuvenileLifeSentence.pdf.

The Committee Against Torture, the official oversight body for the Convention Against Torture, in evaluating the United States' compliance, found that life imprisonment of children "could constitute cruel, inhuman or degrading treatment or punishment," in violation of the treaty. Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture: United States of America*, at para. 35, U.N. Doc. CAT/USA/CO/2 (July 25, 2006).

Moreover, in 2008, the Committee on the Elimination of Racial Discrimination, the oversight body for the CERD, found the sentence incompatible with Article 5(a) of the CERD, particularly because the sentence is applied disproportionately to youth of color and the United States has done nothing to reduce what has become pervasive discrimination. The Committee referred to both the Human Rights Committee and Committee Against Torture's reports on the United States, noting the concern raised in regard to the sentence, and stated:

> In light of the disproportionate imposition of life imprisonment without parole on young offenders – including children – belonging to racial, ethnic and national minorities, the Committee considers that the

> persistence of such sentencing is incompatible with article 5 (a) of the Convention. The Committee therefore recommends that the State party discontinue the use of life sentence without parole against persons under the age of eighteen at the time the offence was committed, and review the situation of persons already serving such sentences.

CERD, Concluding Observations of the United States, at para 21, U.N. Doc. CERD/C/USA/CO/6 (Feb. 6, 2008).

The disproportionate use of this sentence is well documented. In a Human Rights Watch survey of 25 states, the rate of black youth per capita serving life without parole sentences was ten times higher than that of white youth and much higher in some states, such as California where the rate of black youth per capita serving the sentence is 18 times higher than white youth. Human Rights Watch, Submission to the Committee on the Elimination of Racial Discrimination, at 21-22 (Feb. 2008), http://www.hrw.org/en/node/62449/section/2. Youth of color in some jurisdictions receive more than 90% of the LWOP sentences given. *Sentencing our Children to Die, supra*, at 993-95.

In light of the foregoing treaty obligations and the Constitution's Supremacy Clause, the Court should consider the views of the bodies authorized to monitor compliance with the treaties

to which the United States is a party in determining whether the sentence of life without parole for a juvenile violates the prohibition of cruel and unusual punishments under the Constitution.

C. The Uniformity and Consistency of International Law and Practice Should Inform the Court's Eighth Amendment Analysis

As enumerated above, this Court has repeatedly recognized the relevance of international law and opinion when considering whether a sentence complies with the Eighth Amendment. "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime." *Roper*, 543 U.S. at 578 (citations omitted); *see also Enmund*, 458 U.S. at 796, n.22 (death penalty may not be imposed for felony murder, citing the experience of Commonwealth and Western European countries); *Coker*, 433 U.S. at 596 (international opinion relevant in finding death penalty for rape violates Eighth Amendment); *Trop*, 356 U.S. at 102-03 (foreign state practices deemed relevant to determination that denaturalization of military deserter constituted cruel and unusual punishment).

Generally, as this Court has noted, customary international law is "part of our law, and must be ascertained and administered by the

courts of justice of appropriate jurisdiction." *The Paquete Habana*, 175 U.S. 677, 700 (1900). In this regard, the Restatement provides that "[i]nternational law and international agreements of the United States are the law of the United States and supreme over the law of the several States" and "[c]ourts in the United States are bound to give effect to international law and to international agreements of the United States." Restatement § 111(1) & (3). The principle that customary international law is part of United States law applies with even greater force when considering a peremptory norm. *See, e.g., United States v. Mata-Ballesteros*, 71 F.3d 754, 764 n.5 (9th Cir. 1995) (torture, murder, genocide and slavery constitute *jus cogens* norms, which are "nonderogable and peremptory, [and] enjoy the highest status within customary international law"); *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994) ("The right to be free from official torture is fundamental and universal, a right deserving of the highest stature under international law, a norm of *jus cogens*."); *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493, 499 (9th Cir. 1992) ("'it would be unthinkable to conclude other than that acts of official torture violate customary international law'") (citation omitted); *Siderman*, 965 F.2d at 715 ("Courts seeking to determine whether a norm of customary international law has attained the status of *jus cogens* look to the same sources, but must also determine whether the international community recognizes the norm as one 'from which no

derogation is permitted'") (citation omitted); *White v. Paulson*, 997 F. Supp. 1380, 1384 (E.D. Wash. 1998) ("This Court can conceive of no adequate reason why the rationale supporting the existence of judicial authority to recognize implied remedies for constitutional rights does not apply with equal or greater force to *jus cogens* norms of international law, such as the prohibitions on genocide, torture, and slavery").

The uniform rejection by the rest of the world of life without parole sentences for juveniles is weighty evidence that the practice is inconsistent with the Eighth Amendment.

III. THE LAW AND OPINIONS OF THE UNITED KINGDOM ARE PARTICULARLY RELEVANT TO THIS COURT'S EIGHTH AMENDMENT ANALYSIS

A majority of this Court has noted that the United Kingdom's experience is instructive to interpreting the Eighth Amendment not just because of the "historic ties" between our two countries but because the Eighth Amendment was derived from the English Declaration of Rights of 1689. *Roper*, 543 U.S. at 577; *Lawrence*, 539 U.S. at 576. The close relationship between the United Kingdom and the United States has a long history and recent developments in world affairs have made that relationship even closer. The President has noted, "the special relationship between the United States and Great Britain is one that is not just important to me, it's important to the American people. And it is sustained by a common language, a

common culture; our legal system is directly inherited from the English system; our system of government reflects many of these same values ...." Remarks of President Obama, Mar. 3, 2009, U.S. Embassy, London, http://www.usembassy.org.uk/gb083.html. The United States not only shares fundamental values with the United Kingdom, but also a common law heritage, as consistently recognized by this Court. *See, e.g.*, Roper, 543 U.S. at 577 ("it is instructive to note that the United Kingdom abolished the juvenile death penalty" before international covenants prohibiting the practice came into being); *Browning-Ferris Industries of Vermont, Inc., v. Kelco Disposal, Inc.*, 492 U.S. 257, 273 (1989) (discussing Magna Carta and English Bill of rights in determining scope of Eighth Amendment Excessive Fines Clause); *Ferguson v. Georgia*, 365 U.S. 570, 581-82 (1961) (considering evolution of legal competency of criminal defendants in England and United States); *United States* v. *Lee*, 106 U.S. 196, 205 (1882) (American legal doctrines "derived from the laws and practices of our English ancestors."). Consequently, the experience of British law in determining penalties for juvenile offenders can provide guidance for this Court.

A. Historically, Juvenile Offenders Were Treated with More Leniency Than Adults in the United Kingdom

Historically, juveniles were treated differently from adults in terms of sentencing. The United Kingdom abolished the juvenile death penalty for children under age 16 in 1908, Children

Act of 1908, 8 Edw. 7, c. 67 (Eng.), but death sentences for offenders under 18 had already been rarely imposed since the early 18th century because of sympathy for the young. The Children Act 1908 was "a notable piece of legislation, enshrining as it did in almost every section the principle that a young offender shall receive different treatment from an adult." Report of the Departmental Committee on the Treatment of Young Offenders, 1927 Cmd. 2831. While Parliament could have replaced the death penalty with life imprisonment, it adopted instead the sentence of detention at Her Majesty's pleasure ("HMP"), a "less severe form of sentence" for juveniles. *R v. Secretary of State for the Home Department Ex parte Venables,* [1998] A.C. 407 HL at 521 (per Lord Steyn) (hereinafter "*Venables*"). In particular, "[t]here is built into the sentence a measure of leniency in view of the age of the offender at the time of the offence." *Venables*, A.C. 407 HL at 532 (per Lord Hope of Craighead).

In 1933, the Children and Young Person's Act 1933 (Eng.) abolished the death penalty for all persons under age 21. Parliament's Select Committee on Capital Punishment noted that the instability of young people made them less culpable:

> [T]he emotional balance of young people under the age of 21 is unstable, and this instability reduces their responsibility, and that the instability of adolescents, which in some cases may even amount to a form of mental

> disorder is very often a factor in the crime.

Report of the Select Committee on Capital Punishment (1930) at ¶ 189, 193.

These statutory developments formed part of an "elaborate legislative scheme which reflected a general policy of treating young offenders quite differently from older ones." A. W. B. Simpson, Report prepared for submission to the European Court of Human Rights in *Prem Singh v. United Kingdom*, unreported, (21 Feb. 1996), cited with approval in *Venables* [1998] A.C. 407 HL at 481 (per Lord Goff). The statutory developments were intended to impose an obligation upon the courts "to have regard not only to retribution, deterrence and prevention of risk but also to the welfare of the child offender himself." *Venables* at 498–99 (per Lord Browne-Wilkinson). In other words, historically the legal system in England and Wales has recognized that young people who commit murder or other serious offenses should be treated with greater leniency. "It is clear from the authorities which exist ...that, when dealing with a very young person, the court has to have regard to the length of sentence and the perception of the young of that length. By that we mean that a sentence which may be appropriate for someone older may be crushing for someone who is very young." Mr Justice Collins in *R v. W* [2003] 1 Cr. App. R. (S) 95, 504.

B. Sentencing Juveniles to Life Imprisonment without Parole is Prohibited by Law

In England and Wales, juveniles who commit the most serious or heinous of crimes cannot be given an LWOP sentence; rather, the severest penalty is detention at HMP. Powers of Criminal Courts (Sentencing) Act 2000, § 90 (Eng.). This is significant because, to date, the longest sentence, or *tariff* as it is known, imposed on a juvenile for any crime or combination of crimes committed when under the age of 18 is 30 years. Email from Kevin Breame, Public Protection Casework Section, United Kingdom Ministry of Justice/Home Office (July 15, 2009) (on file with counsel).

The sentence of detention at HMP is the statutorily required sentence for murder convictions in the Crown Court where the offender was at least 10, but under the age of 18, at the time of the crime. Powers of Criminal Courts (Sentencing) Act 2000 § 90. Particularly instructive is that for juvenile offenders who commit serious non-homicide crimes, including the types of crimes committed by petitioners Graham and Sullivan, detention falls under the Powers of Criminal Courts (Sentencing) Act of 2000, § 91, which are even less severe than detention at HMP.

When passing a sentence on a juvenile, including a sentence of detention at HMP, the judge effectively must impose a tariff that is roughly half the term that an adult would be given in the same circumstance. First, *all* prisoners in England and Wales are automatically released at

the halfway point of a determinate sentence and then serve the balance on license, a form of parole, unless a threat to society.[9] Once the term period has elapsed, the offender should be released if the Parole Board is satisfied that it is safe to do so. § 28 of the Crime (Sentences) Act 1997.[10]

Furthermore, for juveniles convicted of murder, the judge starts at a presumptive period of 12 years detention, and then adjusts that term based on aggravating or mitigating factors, such as premeditation or evidence of intent to injure but not kill. Criminal Justice Act 2003 (c. 44) Schedule 21, ¶¶ 7-12. However, Schedule 21, para. 9 states: "Detailed consideration of aggravating or mitigating factors may result in a minimum term of

---

[9] There are two parts to a life sentence: the detention period and the license period. The minimum detention period for punitive detention is set by the trial judge, and is commonly referred to as the "tariff period," but may also be referred to as the "minimum term" in the Criminal Justice Act 2003. After the individual has been detained for the period specified in the minimum term, they become eligible to have their release reviewed by the Parole Board. If the Parole Board determines that sufficient progress in rehabilitation during the minimum period has not been made, then the individual will remain detained, with review taking place about once a year. If the Board finds that they are no longer a threat to society, the Board can recommend release, and the offender will be released on "license," under parole review for the remainder of their natural life.

[10] The determination of the tariff or minimum term in relation to mandatory life sentences, for example, requires the trial judge to specify in the order that the early release provisions (of the Crime (Sentences) Act 1997, paras. 5-8) will apply after a minimum term of detention.

any length (whatever the starting point), or in the making of a whole life order." But Schedule 21, para. 1, makes clear that 'whole life order' means an order made under §269(4) – and §269(4) does not allow for imposition of LWOP on a juvenile. Significantly, as indicated above, the longest tariff imposed on a person who committed any crime when under age 18 years is 30 years.

In sum, the laws of England and Wales legally and effectively prohibit life without parole sentences for juvenile offenders. While it is not clear that such a sentence was ever used, it clearly has been prohibited for the better part of the past seventy-five years. The prohibition emerged historically in recognition of the inherent instability and emotional imbalance of persons under age 18, which made such sentences cruel and unusual. In recognition of the special relationship between English jurisprudence and this country, and the direct roots of the Eighth Amendment in English law, this Court should follow suit and recognize that the Eighth Amendment prohibits imposition of life without parole sentences for juvenile offenders.

IV. CONCLUSION

In considering constitutional values related to the death penalty, the most severe punishment of juveniles, this Court in *Roper* observed:

> It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime

> reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under [eighteen] as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights. and suffering of others. If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under [eighteen] as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty. When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity. *Roper*, 543 U.S. at 573–74 (citations omitted).

As it did in relation to the juvenile death penalty, this Court should find these same

principles, which have been applied to universally condemn in international law and practice the sentencing of juveniles to life in prison without parole, instructive in interpreting the Eighth Amendment here. For the reasons stated above, the sentences of Mr. Graham and Mr. Sullivan should be overturned.

Respectfully Submitted,

Constance de la Vega
Counsel of Record
Michelle Leighton
Neil A.F. Popovic
Julian Killingley
Mark George, Q.C.
Hannah Gorman

Counsel for *Amici Curiae*
Amnesty International
Amsterdam Bar Association
Bar Council of Hong Kong
Bar Human Rights Committee of
England and Wales
Bar of Montreal
Center for Constitutional Rights
Columbia Law School
Human Rights Clinic
Human Rights Advocates
Law Council of Australia
Law Society of England and Wales
Law Society of Ireland
New Zealand Law Society
Netherlands Bar Association
The Advocates for Human Rights
Union Internationale des Avocats[11]

---

[11] Research assistance was provided by students at the University of San Francisco School of Law, Columbia Law School and the Center for Constitutional Rights; and Molly Newland at Sheppard Mullin Richter & Hampton LLP.

APPENDIX

Amnesty International is a worldwide human rights movement of more than 2.2 million members and subscribers. It works independently and impartially to promote respect for human rights. It monitors domestic law and practices in countries throughout the world for compliance with international human rights law and international humanitarian law and standards, and it works to prevent and end grave abuses of human rights and to demand justice for those whose rights have been violated. It has addressed the issue of juvenile life without parole and co-published the report *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (2005).

The Amsterdam Bar Association is a local Bar Association, which is an autonomous public-law body. Local Bar Associations in the Netherlands promote decent exercise of law practice and are authorized to take all measures that can contribute thereto. Pursuant to the Act on Advocates, advocates are obliged to become a member of the Bar. The Amsterdam Bar notes that the subject matter of juvenile sentences is very important from a Dutch point of view.

The Bar Human Rights Committee of England and Wales (BHRC) is the international human rights arm of the Bar of England and Wales. It is an independent body primarily concerned with the protection of the rights of advocates and judges around the world and with defending the rule of law and internationally

recognized legal standards relating to the right to a fair trial. The BHRC regularly appears in cases where there are matters of human rights concern, and has experience of legal systems throughout the world. The BHRC has previously appeared as *amicus curiae* in cases before the United States Supreme Court, including *Roper v. Simmons*, 543 U.S. 551 (2005).

The Bar of Montreal, with over 12,500 members, is one of the largest bar associations in the world, as well as being the second largest French-speaking bar association. Its members' expertise covers all aspects of the legal practice, administration and business. Many of its members are recognized nationally and internationally in these fields. With more than 160 years of history, the Bar of Montreal is considered a model for its leadership in the pursuit of excellence in ethics and high standards of competence. The Bar of Montreal's mission is to protect the public. With this in mind, the Bar organizes a number of activities each year which inform members of the public of their legal rights and how they are to be exercised.

The Center for Constitutional Rights (CCR) is a national non-profit legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is a non-profit legal and educational

organization committed to the creative use of law as a positive force for social change.

The Columbia Law School Human Rights Clinic bridges theory and practice by providing students with hands-on experience working on active human rights cases and projects. Working in partnership with experienced attorneys and institutions engaged in human rights activism, both in the United States and abroad, students contribute to effecting positive change locally and globally. In recent years, the Human Rights Clinic has worked on several matters concerning human rights issues in the United States, including *In re Juveniles Sentenced to Life Without Parole in the United States of America*, Petition P-161-06, Inter-Am. C.H.R. (2006), concerning the mandatory sentencing of juveniles in Michigan to life without the possibility of parole.

The Hong Kong Bar Association is the professional organization of Barristers in Hong Kong. Its objects are generally to consider and to take proper action on all matters affecting the legal profession and the administration of justice. It is also keen to promote the upholding of human rights and the rule of law. The Association is governed by the Bar Council, an executive committee comprising elected and co-opted members representing different standings at the Bar. All matters of policy are decided by the Bar Council and its various Special Committees. The Association is joining as a signatory to this Brief to endorse what it sees as the well-settled prevailing international standard on the relevant point in

issue, and to present it to this Court for its consideration.

Human Rights Advocates, a California non-profit corporation, founded in 1978, with national and international membership, endeavors to advance the cause of human rights to ensure that the most basic rights are afforded to everyone. Human Rights Advocates has Special Consultative Status in the United Nations and has participated in meetings of its human rights bodies for over 25 years, where it has addressed the issue of juvenile sentencing. Human Rights Advocates has participated as *amicus curiae* in cases involving individual and group rights where international standards offer assistance in interpreting both state and federal law. Cases that it has participated in include: *Roper v. Simmons*, 543 U.S. 551 (2005); *Grutter v. Bollinger*, 539 U.S. 306 (2003); and *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

The Law Council of Australia is the national body representing the Australian legal profession at home and overseas and maintains close relationships with legal professional bodies throughout the world. The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council speaks on issues of national and international importance. The Law Council considers this case concerning juvenile justice and human rights to be one such issue. Therefore, the Law Council supports the *amicus curiae* brief being

submitted to the Supreme Court of the United States on behalf of the petitioners Graham and Sullivan.

The Law Society of England and Wales is the professional body representing more than 138,000 solicitors in England and Wales. Its concerns include upholding the independence of the legal profession, the rule of law and human rights throughout the world. The Law Society has made submissions as *amicus curiae* to this Court on a number of previous occasions.

The Law Society of Ireland is the representative body of Ireland's 12,000 solicitors. The Law Society, through the work of its Human Rights Committee, aims to raise awareness in the profession and the public of human rights, to uphold human rights in the administration of justice, to promote and support international human rights and to promote and support lawyers working for the implementation of international human rights standards. The Law Society would like to lend its support to the *amicus curiae* brief to be submitted to the Supreme Court of the United States on this matter.

The Netherlands Bar Association is the public law based professional organization of which all 16000 Dutch lawyers (advocates) are compulsory members. The core activity is promoting and overseeing the quality and integrity of the lawyer. The Netherlands Bar does not serve the lawyers' interests but the general interests of delivering good legal aid to everyone who needs it.

The Bar has regulatory powers and upholds a strong disciplinary system. The Bar defends and promotes the enforcement of the rule of law and human rights.

The New Zealand Law Society is a professional body which regulates all barristers and solicitors in New Zealand and represents all practitioners who hold practicing certificates as members. The Society has a current membership of over 10,600 practitioners. Aside from regulating and controlling the practice of the profession of law in New Zealand, the Society is active in assisting and promoting the reform of the law, for the purpose of upholding the rule of law and the administration of justice.

The Advocates for Human Rights is a non-governmental, non-profit organization dedicated to the promotion and protection of internationally recognized human rights. Founded in 1983, today The Advocates for Human Rights engages more than 800 active volunteers annually to document human rights abuses, advocate on behalf of individual victims of human rights violations, educate on human rights issues, and provide training and technical assistance to address and prevent human rights violations. The Advocates for Human Rights has a strong interest in ensuring that the United States construe its authority to detain persons in a way that is consistent with international human rights standards and to adhere to the United States' non-derogable obligations.

The Union Internationale des Avocats (UIA) was created in 1927 by a group of French speaking European lawyers convinced of the need for lawyers to establish international contacts. Today, the UIA is an association open to all lawyers of the world, made up of both general and specialist practitioners, counting more than 200 bar associations, organizations or federations (representing nearly two million lawyers) as well as several thousand individual members from over 110 countries.

AMICUS CURIAE BRIEF

(19) (19)

No. 08-7621 and 08-7412

In the

Supreme Court of the United States

JOE HARRIS SULLIVAN,

Petitioner,

v.

FLORIDA,

Respondent.

and

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

FLORIDA,

Respondent.

On Writ of Certiorari to the
District Court of Appeal of Florida, First District

BRIEF AMICUS CURIAE OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF RESPONDENTS

HONORABLE EDWIN MEESE III
214 Massachusetts Avenue NE
Washington, DC 20002
Telephone: (202) 546-5400

JOHN C. EASTMAN
Center for Constitutional Jurisprudence
c/o Chapman University School of Law
One University Drive
Orange, California 92886

Counsel of Record:
ANTHONY T. CASO
Law Office of Anthony T. Caso
8001 Folsom Blvd., Suite 100
Sacramento, California 95826
Telephone: (916) 386-4432
Facsimile: (916) 307-5164

Of Counsel:
JONATHON SKILES
2220 Tulare, Suite 1000
Fresno, California 93721

STEWART HICKS
921 11th Street, Suite 300
Sacramento, California 95814

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence

QUESTION PRESENTED

Does the Eighth Amendment's prohibition on cruel and unusual punishment prohibit a state legislature from setting a punishment of life in prison without parole for heinous crime committed by juveniles?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I FMRI ANALYSIS IS UNRELIABLE AND IS INADMISSIBLE UNDER A RULE 702 ANALYSIS 4

II THE THEORIES ON WHICH THE AMA AMICUS BRIEF RELIES DO NOT SATISFY THE PEER REVIEW, PUBLICATION, AND GENERAL ACCEPTANCE IN THE RELEVANT SCIENTIFIC COMMUNITY ANAYLSIS UNDER *DAUBERT* 12

III THE COURT MAY NOT RELY ON UNCERTAIN SCIENTIFIC THEORY TO OVERRULE A LEGISLATIVE POLICY JUDGMENT 23

CONCLUSION 28

TABLE OF AUTHORITIES

Cases

Boy Scouts of America v. Dale,
530 U.S. 640 (2000) 1

Daubert v. Merrell Dow Pharmaceuticals, Inc.,
509 U.S. 579 (1993) ..... passim

Elk Grove Unified Sch. Dist. v. Newdow,
542 U.S. 1 (2004) 1

FCC v. Beach Communications, Inc.,
508 U.S. 307 (1993) 26

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 1

Harrington v. Iowa,
659 N.W.2d 509 (Iowa 2003) 20

Kumho Tire Co., Ltd. v. Carmichael,
526 U.S. 137 (1999) 3-4

Marbury v. Madison, 5 U.S. 137 (1803) 26

McGowan v. Maryland, 366 U.S. 420 (1961) 28

Nordlinger v. Hahn, 505 U.S. 1 (1992) 28

Roper v. Simmons, 543 U.S. 551 (2005) 13

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,
531 U.S. 159 (2001) 1

United States R.R. Ret. Bd. v. Fritz,
449 U.S. 166 (1980) 27

United States v. Morrison, 529 U.S. 598 (2000) 1

Vance v. Bradley, 440 U.S. 93 (1979) 26

Washington v. Glucksberg, 521 U.S. 702 (1997) 27

Zelman v. Simmons-Harris, 536 U.S. 639 (2002) 1

Other Authorities

Aggarwal, Neil K., *Neuroimaging, Culture, and Forensic Psychiatry*, 37 J. Am. Acad. Psychiatry Law 239 (2009) 16-17

Aharoni, Eyal, et al., *Can Neurological Evidence Help Courts Assess Criminal Responsibility? Lessons from Law and Neuroscience*, 1124 Ann. N.Y. Acad. Sci. 145 (2008) ..... passim

Appelbaum, Paul S., *The New Lie Detectors: Neuroscience, Deception, and the Courts*, 58 Psychiatric Services 460 (Apr. 2007) 20

Boire, Richard G., *Searching the Brain: The Fourth Amendment Implications of Brain-Based Deception Detection Devices*, 5 Am. J. Bioeth. 62 (2005) 20

Chipman, Nathaniel, *Sketches of the Principles of Government* (1793) 25

Gazzaniga, Michael S., *Facts, Fictions and the Future of Neuroethics* (2006) 16, 18

Giridhardas, Anand, *India's Novel Use of Brain Scans in Courts is Debated*, The New York Times, Sept. 14, 2008 19

Grafton, Scott T., et al., *Brain Scans Go Legal*, Scientific American Mind, Dec. 2006/Jan. 2007 15

Greely, Henry T., *Premarket Approval for Lie Detections: Aan Idea Whose Time May Be Coming*, 5 Am. J. Bioeth. 50 (2005) 20

Greene, Joshua & Cohen, Jonathan, *For the Law, Neuroscience Changes Nothing and Everything*, 359 Phil. Trans. R. Soc. Lond. B 1775 (2004) 9

Keckler, Charles N.W., *Cross-Examining the Brain: A Legal Analysis of Neural Imaging for Credibility Impeachment*, 57 Hastings L.J. 509 (2006) 20

Kozel, F. Andrew, et al., *Detecting Deception Using Functional Magnetic Resonance Imaging*, 58 Biological Psychiatry 605 (2005) 20

Kriegeskorte, Nikolaus, et al., *Circular Analysis in Systems Neuroscience: The Dangers of Double Dipping*, 12 Nature Neuroscience 5 (2009) 8, 10

Langleben, Daniel D. & Dattilio, Frank M., *Commentary: The Future of Forensic Functional Brain Imaging*, 36 J. Am. Acad. Psychiatry Law 502 (2008) 20

Langleben, Daniel D., et al., *Telling Truth From Lie in Individual Subjects With Fast Event-Related fMRI*, 26 Human Brain Mapping 262 (2005) 20

Leapman, Ben, *Crooks May Face 'Sci-Fi' Brain Scan*, The Daily Telegraph, Feb. 11, 2007, *available at* http://www.telegraph.co.uk/news/uknews/1542300/Crooks-may-face-%27sci-fi%27-brain-scan.html (last visited Sept. 20, 2009) 19

Madison. James, *Helvidius No. 1, in* JAMES MADISON: WRITINGS (2d ed. 1999) 24

Medina, John J., *Functional Magnetic Resonance Imaging: Round 2*, 26 Psychiatric Times 5 (2009) 22

Medina, John J., *The Teenaged Brain: Part 1*, 26 Psychiatric Times 3 (2009) 21-22

Medina, John J., *The Teenaged Brain: Part 2*, 26 Psychiatric Times 1 (2009) 22-23

Morse, Stephen J. & Hoffman, Morris B., *The Uneasy Entente Between Insanity and Mens Rea: Beyond Clark v. Arizona*; 97 J. Crim. Law & Criminology (June 22, 2007) 9

Morse, Stephen J., *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 Ohio S. J. Crim. Law 397 (2006) 19

Natu, Nitasha, *This Brain Test Maps the Truth*, The Times of India, July 21, 2008 19

Raghava, M., *Stop Using Brain Mapping for Investigation and as Evidence*, The Hindu, Sept. 6, 2008 19

Reeves, Donald, et al., *Limitations of Brain Imaging in Forensic Psychiatry*, 31 J. Am. Acad. Psychiatry Law 89 (2003) 11-12, 17

The Federalist (Clinton Rossiter ed., 1961) 24-25

Vincent, Nicole A., *Neuroimaging and Responsibility Assessments*, Springerlink.com, Jan. 21, 2009 15

Vul, Edward, et al., *Puzzlingly High Correlations in fMRI Studies of Emotion, Personality, and Social Cognition*, 4 Perspectives in Psychological Science 319 (2009) 7-8, 10

Weinberger, Daniel R., et al., *The Adolescent Brain: A Work in Progress* (June 2005), *available at* http://www.thenationalcampaign.org/resources/pdf/BRAIN.pdf (last visited Sept. 20, 2009) 16

Wolpe, Paul Root, et al., *Emerging Neurotechnologies for Lie-Detection: Promises and Perils*, 5 Am. J. Bioethics 39 (2005) 20

Zeki, Semir & Goodenough, Oliver, eds., *Law and the Brain* (2006) 9

IDENTITY AND INTEREST OF AMICUS

Amicus, Center for Constitutional Jurisprudence[1] is dedicated to upholding the principles of the American Founding, including separation of powers and due respect for the policy-making role of state legislatures. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000).

The Center believes the issue before this court is one of special importance to the plan of the Constitution. Although framed by some amici as a question of medical science, that science is far from established. That developing science may inform legislative policy judgments, but it cannot provide a

---

[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

basis for the federal courts to usurp that policy-making function.

SUMMARY OF ARGUMENT

The "scientific" evidence presented in the American Medical Association and the American Academy of Child and Adolescent Psychiatry Amicus Brief is far from being established as accepted scientific fact. The tests, results, and interpretation of those results cannot yet meet admissibility and reliability standards as established by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). It is the type of developing science that may be relied on by legislatures as they consider policy choices, but is not the type of established and accepted science that a court may use to overturn those policy choices.

In designing our system of government, the Founders vested the legislative branch with the power to make policy. While the judicial power exists to ensure that legislative policy-making stays within the outer bounds established by the Constitution, the judicial branch was not granted a broad power to overrule policy choices on the basis of a dispute over which policy may be wisest. Science cannot yet provide a reliable basis for concluding that the policy choice of the Florida legislature in this case was either "correct" or "erroneous." This Court cannot rely on the scientific theories presented in the AMA brief, therefore, to overrule the state's policy choice.

ARGUMENT

As one paper suggests, "the language of law is vastly different from the language of neuroscience.

Matching neurological data to legal criteria can be much like performing a chemical analysis of a cheesecake to find out whether it was baked with love."[2]

The argument that the juvenile brain is too insufficiently developed to constitutionally permit imposition of life in prison without the possibility of parole (LWOP) for the most heinous and violent criminal offenses is predicated on advocacy masquerading as science. In *Daubert*, and as later explained in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), this Court established the criteria by which all expert testimony is to be measured prior to its admission as evidence in a trial setting. The purpose of these criteria "is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho*, 526 U.S. at 152. These cases do not require that the scientific opinion be "undisputed," but they do require that the opinion be "scientifically valid." *Daubert*, 509 U.S. at 592-93. This Court should, at a minimum, use the same criteria to test an argument presented as "scientific proof" that a legislative choice is constitutionally illegitimate.

---

[2] Eyal Aharoni, et al., *Can Neurological Evidence Help Courts Assess Criminal Responsibility? Lessons from Law and Neuroscience*, 1124 Ann. N.Y. Acad. Sci. 145, 146 (2008).

The guidelines to determine relevance and reliability of claimed scientific proof include: whether the procedure has been tested under field conditions, whether it has been subject to peer review and publication, the known or potential error rate, whether standards for the operation of the technique have been developed, and whether the procedure is generally accepted in the scientific community. No single factor is dispositive. *Kumho*, 526 U.S. at 151. However, "a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony." *Id.* at 152.

The *Daubert* factors that should bear the greatest scrutiny in the case at bar are the potential error rates, peer review, publication, and general acceptance in the relevant scientific community of the theories championed by the AMA/AACAP Brief.

I

FMRI ANALYSIS IS UNRELIABLE AND IS INADMISSIBLE UNDER A RULE 702 ANALYSIS

The AMA/AACAP Brief opens with a remarkable statement: "In short, the average adolescent cannot be expected to act with the same control or foresight as a mature adult." What makes the statement so stunning and so dangerous is that it is the preamble for a public policy position that juveniles should not be held fully accountable for committing aggravated first degree murder, aggravated rape, torture and the other limited classes of crimes for which the term of life in prison without the possibility of parole exists.

The AMA/AACAP Brief includes a number of citations to published papers as support for its position that juveniles cannot be expected to avoid engaging in criminal conduct. None of the cited authorities actually supports that proposition. Not one of the cited authorities establishes that juvenile brain development is the source of juvenile crime or a basis to nullify the states' right to impose sanctions for criminal conduct.

Juveniles are treated differently in the vast majority of criminal cases. A juvenile caught joy-riding in a stolen car or shoplifting a six-pack of beer is treated far differently than an adult. There is a focus in juvenile court on rehabilitation and reformation. That differentiation necessarily yields to a state's right to protect its citizens when the juvenile commits the types of atrocious crimes that qualify for terms of life in prison without the possibility of parole. At that point the AMA/AACAP Brief's simplistic rendition of "kids will be kids" falls flat.

The AMA/AACAP Brief is remarkably silent on the challenges to the types of fMRI (functional Magnetic Resonance Imaging) studies it cites. Two major papers published in 2009 in prominent journals that document error rates of over 50% in published fMRI studies are conspicuously absent.

As this Court stated in *Daubert*, "[t]he Rules—especially Rule 702—place appropriate limits on the admissibility of purportedly scientific evidence by assigning to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.* at 579-80. As described below, the theories set forth

in the AMA/AACAP Brief fail to satisfy the threshold requirements of Rule 702 as described in *Daubert*. There is no evidence whatsoever that brain development has a causal link with criminal conduct. Without that predicate fact, fMRI analysis of any brain, juvenile or adult, is irrelevant. *Id.* at 593. Even if it were relevant, the controversy over the methodology used in fMRI analysis renders such studies untrustworthy and demonstrates a potential error rate that compels its exclusion pursuant to Rule 702.

The AMA/AACAP Brief argues that juvenile brains are not as fully developed as adult brains. It goes a step further and argues that the difference in brain development causes juveniles to engage in more risk-taking behavior as well as other behavioral traits. What is completely lacking is any evidence linking those claims to the inference that juvenile brain development causes juvenile crime. There certainly is no evidence to support the additional inference that juvenile brain development is a scientific basis for mitigating the punishment for juveniles who commit the heinous crimes that qualify for terms of life in prison without the possibility of parole.

The opponents to lengthy juvenile sentences have the cart well before the horse. They have argued that juvenile brains are not fully developed and that the developmental differences are manifested in risk-taking behavior and reward-based decision making. From that tenuous perch they leap to the conclusion that juvenile brain development must also account for juvenile crime. That leap is based on an inference born out of a social policy

position and is not supported by relevant, admissible evidence.

In *Daubert* Justice Blackman wrote,

> Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry."

Id. at 593 (citation omitted). Functional brain imaging fails that standard.

A 2009 published study authored by scientists from the Massachusetts Institute of Technology and the University of California, San Diego, entitled *Puzzlingly High Correlations in fMRI Studies of Emotion, Personality, and Social Cognition*[3] (hereinafter *fMRI Study*) addressed the problems observed in the methodology behind the current rash of fMRI studies.

The authors of the *fMRI Study* identified 55 published articles involving fMRI analysis where fMRI testing was linked with some form of

---

[3] Edward Vul, et al., *Puzzlingly High Correlations in fMRI Studies of Emotion, Personality, and Social Cognition*, 4 Perspectives in Psychological Science 319 (2009). This study was formerly known as *Voodoo Correlations in Social Neuroscience*.

behavioral trait relating to emotion, personality, or social cognition. The *fMRI Study* was able to obtain methodological details from the authors of 52 of the 55 articles. Of those, 54% used methodology that rendered the conclusions untrustworthy and of no scientific value.

The *fMRI Study* is not the only prominent critique of the methodology used in a significant percentage of published fMRI analysis. Another 2009 study published by four researchers at the National Institute of Mental Health entitled *Circular Analysis in Systems Neuroscience: The Dangers of Double Dipping*[4] (hereinafter *Circular Analysis Report*) documented the same methodological problems.[5]

The *Circular Analysis Report* examined all of the fMRI studies published in 2008 in five prestigious journals (*Nature*, *Science*, *Nature Neuroscience*, *Neuron*, and *Journal of Neuroscience*). The authors were able to identify 134 published papers.[6]

---

[4] Nikolaus Kriegeskorte, et al., *Circular Analysis in Systems Neuroscience: The Dangers of Double Dipping*, 12 Nature Neuroscience 5 (2009).

[5] "A notorious drawback of research in fMRI scanning technology is its meager temporal resolution. A tremendous amount of activity can occur in the brain in a matter of seconds." Aharoni, *supra*, at 158.

[6] The sheer number of studies—nearly three per week—identified by the authors of the *Circular Analysis Report* strongly suggests that the field of study surrounding fMRI is anything but settled science.

Of the 134 published papers, 42% shared a common significant error in methodology. *Id.* Another 14% could not even be evaluated because the methodological information given was insufficient to reach a conclusion. *Id.*

The AMA/AACP Brief has presented their argument in a manner that suggests that there exist no problems with the science involved in neuroimaging. However, there is not a single published case upholding the use of functional brain imaging technology in the guilt phase of a trial. One cannot simply look at a person's brain and infer the presence or absence of a culpable mental state.[7]

The problems documented above fall squarely within the language of *Daubert* and Rule 702. This Court stated,

---

[7] It had been argued that "statements such as, 'My genes made me do it,' 'My upbringing made me do it,' and 'My Twinkie made me do it' are not popularly compelling excuses in modern jurisdictions, so 'My brain made me do it' should not be exculpatory either." Stephen J. Morse & Morris B. Hoffman, *The Uneasy Entente Between Insanity and Mens Rea: Beyond Clark v. Arizona*; 97 J. Crim. Law & Criminology (June 22, 2007). Nevertheless, see Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 Phil. Trans. R. Soc. Lond. B 1775 (2004). Also found in Semir Zeki & Oliver Goodenough, eds., *Law and the Brain* (2006). It is significant to note that Greene and Cohen believe that no one, fully developed adult or adolescent, is responsible for their actions, because their brains made them do it. Thus, according to Greene and Cohen, the debate regarding whether juveniles should receive LWOP sentences is merely an intellectual exercise that has no relevance, in that no one is responsible for their actions.

> Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error, *see, e.g., United States v. Smith*, 869 F.2d 348, 353-354 (CA7 1989) (surveying studies of the error rate of spectrographic voice identification technique), and the existence and maintenance of standards controlling the technique's operation, *see United States v. Williams*, 583 F.2d 1194, 1198 (CA2 1978) (noting professional organization's standard governing spectrographic analysis), *cert. denied*, 439 U.S. 1117, 99 S. Ct. 1025, 59 L.Ed.2d 77 (1979)."

Daubert, 509 U.S. at 594.

The documented error rate in fMRI studies is of great concern when the technology is used to try to explain or even to mitigate criminal conduct. The danger is compounded by the likelihood that a significant amount of error will result, either intentionally or unintentionally, from a desire to advocate for a strongly held public policy position. The *fMRI Study* and the *Circular Analysis Report* demonstrate why *Daubert* and Rule 702 render the opinions based on fMRI studies and other functional brain imaging techniques inadmissible.

There is an additional problem generated by the methodology used in functional brain imaging. To what are the results to be compared? What is a "normal" brain for purposes of comparison? When one attempts to narrow the focus to alleged differences between a juvenile brain and an adult brain the question becomes even more glaring.

Does one compare the functional brain imaging results of all subjects under the age of eighteen with what someone arbitrarily selects as having the "normal" brain of a nineteen year old? Should the "normal" brain be defined as a "normal" twenty year old, thirty year old, or perhaps the "normal" brain of a forty-five year old?

Should comparisons be made across gender lines or within gender lines? Should the functional brain imaging results of female juvenile subjects be compared to a "normal" adult male? Should a juvenile male subject's functional brain imaging results be compared to the "normal" brain of a thirty (30) year old female?

The questions become overwhelming when one expands the questioning to sexual orientation, particular aptitudes such as art, analytical reasoning, or even documented differences between individuals who process information more with the left side of their brain versus the right. If the constitution mandates that a state must take brain development and function into account before the state can act to ensure the public safety of its citizens, where does the inquiry stop?[8]

---

[8] The problematic nature of defining "normal," particularly in a forensic analysis, was highlighted in the study *Limitations of Brain Imaging in Forensic Psychiatry*. The authors stated,

> The definition of normal is still more slippery in forensic evaluations in which the brain activity being evaluated is purported to relate to function or behavior. In this situation, the psychiatrist should be aware of the period for which the definition of normal properly holds. Because the brain exhibits

— *continued* —

The attempt by the AMA/AACAP Brief to correlate criminal conduct with brain development leads to an absurd conclusion. If brain development is the basis for criminal culpability we need to have different, constitutionally mandated standards for men versus women, gays versus straight, left-brained people versus right-brained people, artistic people versus analytic people as well as other variations to numerous to mention. The other option is to recognize what our history and founding documents have consistently supported: States have the right and obligation to hold individuals accountable for their decision to engage in criminal conduct.

II

THE THEORIES ON WHICH THE AMA AMICUS BRIEF RELIES DO NOT SATISFY THE PEER REVIEW, PUBLICATION, AND GENERAL ACCEPTANCE IN THE RELEVANT SCIENTIFIC COMMUNITY ANAYLSIS UNDER *DAUBERT*

The AMA/AACAP Brief presents their argument as if it were settled science. The brief ascribes to the view that adolescents of all ages cannot and should not be held responsible for their actions by LWOP

> elasticity—a dynamic state of continuous adjustment to external and internal stimuli—an image taken at one time, may not resemble the image taken in the same subject at a different time. Yet both images could reflect normal function.

Donald Reeves, et al., *Limitations of Brain Imaging in Forensic Psychiatry*, 31 J. Am. Acad. Psychiatry Law 89 (2003)

sentences, because their brains are not as developed as "normal" adult brains. This is not settled science, as the following references will demonstrate.[9] In fact, there is a growing degree of skepticism, speculation, and more reasoned assessment associated with neurological evidence in general, and the neurological community appears to have stepped back and attempted more accurately to assess the reality of the state of the science of neuroimaging.[10]

"How might neuroscience determine whether a particular person performed a particular act intentionally?" The answer offered in one article is a direct refutation of the conclusions propounded by the AMA/AACAP Brief. Neuroimaging technology cannot demonstrate the presence or absence of intent for a particular crime charged, because "there is no known way to retroactively observe the state of the brain as it was during the commission of the offense. It still might be possible to answer this question indirectly and probabilistically by showing that the individual probably lacked the ability to form plans or intentions."[11]

---

[9] Indeed, it is significant to note that a large number of the following references offered in this section post date this Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005).

[10] Nevertheless, *see* footnote 24, *infra*, wherein some of the more "innovative" uses for neuroimaging technology are discussed.

[11] Aharoni, *supra*, at 156. "Moreover, if strong evidence of specific brain dysfunction is found, this alone does not necessarily imply innocence or impunity because, after all, most individuals with similar dysfunction never commit crimes. . . . [T]here are several missing links in the connection between neuroscience and responsibility."

Is a trial court to base *Daubert* admissibility on "probably?" This article goes on to point out that even if one were successfully to perform tests on a brain with the goal of ascertaining whether the anticipated part of the brain activates during "intentional" acts, there exist too many variables to conclude an actual cause and effect. In other words, even where it appears that the brain has difficulty forming "intent," it is impossible to determine (without speculation) what caused the inability to form the intent. (The opposite is also true.) The problem is that "it does not necessarily follow that abnormalities in this region imply an inability to form intentions."[12] Furthermore, there is no evidence that the obstacles described above can be assessed in adolescents when they cannot be accomplished for adults.

This conclusion alone calls into question the very basis upon which the AMA/AACAP Brief stands. If the scans are unreliable, then the conclusions which result from those scans are unreliable. Accordingly, the very science upon which the AMA/AACAP Brief relies becomes irrelevant and inadmissible to the issue of LWOP for juvenile offenders. If this so-called evidence fails to stand up to the *Daubert* test of admissibility, how can it be the basis for ruling that the Constitution prohibits legislatures from deciding that juveniles of any age who commit heinous crimes cannot be sentenced to life without parole?

---

[12] Aharoni, *supra*, at 151-52.

A recent article[13] points out ten "worries and problems" related to neuroimaging that significantly demonstrate the lack of scientific consensus and general acceptance in the scientific community. The author opines that these ten facts collectively demonstrate "the fact that modern neuroimaging techniques are still in their infancy, that they are still an inexact science." Accordingly, neuroscientists and the legal community would be well advised to exercise care and skepticism regarding the conclusions based upon the science involved.[14] A few of the salient points are discussed below.

Not all people with abnormal brains commit crimes.[15] Indeed, most individuals with similar brain dysfunctions never commit crimes.[16] Current understanding of how the human brain actually

---

[13] Nicole A. Vincent, *Neuroimaging and Responsibility Assessments*, Springerlink.com, Jan. 21, 2009.

[14] *Id.* at n.9. The author goes on to say that ultimately some of these problems may be resolved; however their significance casts serious doubt as to the relevance and admissibility of such scan evidence in trial.

[15] *See also* Aharoni, *supra*, at 156 "if strong evidence of specific brain dysfunction is found, this alone does not necessarily imply innocence or impunity because, after all, most individuals with similar dysfunction never commit crimes." It should be noted that the AMA/AACAP Brief does not explain why so few adolescents commit the heinous crimes that usually qualify for LWOP despite the differences they adduce.

[16] *See* Aharoni, *supra*. *See also* Scott T. Grafton, et al., *Brain Scans Go Legal*, Scientific American Mind, Dec. 2006/Jan. 2007.

works on many levels remains rudimentary.[17] Methodological and technological problems with current neuroimaging techniques cast doubt over the usefulness of neuroimaging data.[18] In the current

---

[17] *See* Daniel R. Weinberger, et al., *The Adolescent Brain: A Work in Progress* 4 (June 2005), *available at* http://www.theationlcampaign.org/resources/pdf/BRAIN.pdf (last visited Sept. 20, 2009). The authors conclude: "More research is needed to fully understand the brain development, including the relative influence of genetic and environmental factors and how much of the brain's developing 'wiring diagram' process is automatic versus how much is susceptible to manipulation and intervention." *See also* Neil K. Aggarwal, *Neuroimaging, Culture, and Forensic Psychiatry*, 37 J. Am. Acad. Psychiatry Law 239 (2009).

[18] *See* Michael S. Gazzaniga, *Facts, Fictions and the Future of Neuroethics* 8 (2006) (citation omitted).

> With new neuroimaging techniques, lawyers and investigators are excited by the possibilities of being able to identify areas of the brain responsible for everything from violent behavior to lying. If we can put someone in a scanner and see if they are lying, or identify brains that are angrier than others, can't this information be used to prove or defend against guilt in a court of law? In fact, the answer should be an emphatic no. While the advances in neuroimaging techniques are exciting, they are not reductive in this way. Being able to see an area of the brain light up in response to certain questions . . . may reveal some fascinating things about how certain cognitive states may work, but it is dangerous and simply wrong to use such data as irrefutable evidence about such cognitive states. What we know about brain function and brain responses is not always interpretable in a single way and therefore should not be used as infallible evidence the way DNA evidence is infallible.

state of modern neuroscience, it is impossible to go back in time and determine what capacities persons had at the time they committed their crimes. There is no known way retroactively to observe the state of the brain as it was during the commission of the offense. It still might be possible to answer this question indirectly by showing that the individual *probably* lacked the ability to form plans or intentions.[19] Social factors, and not just neurological impairments, also play some role in determining our behavior.[20]

See also Aggarwal, *supra*: "First, the neuroimaging technology in its present state is poorly understood. Second, functional neuroimaging as an instrument cannot properly measure sociolegal values such as intentionality. Third, functional neuroimaging may subvert theories of individual agency with major consequences."

See also Reeves, *supra*. The authors refer to problems relating to the differences in technicians, choosing color variations, reading results, and even the type of machine used—all of which will cause differences in interpretation of the results.

[19] *See* Aharoni, *supra*, at 151.

> How might neuroscience determine whether a particular person performed a particular act intentionally? Unfortunately, modern neuroscience is in no position to demonstrate a lack of intention for the particular crime charged because of course there is no known way to retroactively observe the state of the brain as it was during the commission of the offense.

See also Aggarwal, *supra*.

[20] Moreover, the AMA/AACAP Brief does not explain why there are such different rates of serious adolescent offending across

— *continued* —

If neuroimaging can be used to exculpate, it certainly may be used to *establish* criminal liability.[21] Regarding this last point, Stephen J. Morse argues that most people who wish to inject neuroscience into criminal responsibility assessments believe that the neuroscience must necessarily be exculpatory. We have seen that this does not follow, and, indeed, even if neuroscience could be demonstrated to be routinely relevant, it is

---

different developed nations despite the similarities in brain development. *See* Gazzaniga, *supra*, at 12.

> Although cognitive neuroscience continues to show us how the brain is an automatic machine, and that many of our actions are predetermined by our brains and our mind often concocts the rationale for the action after the fact, that does not mean that human behavior is predetermined and automatic. We still have personal responsibility. Not all schizophrenics are violent and not all people raised by bad parents are criminals. 'My brain made me do it' is not an excuse.

[21] In Aharoni, *supra*, at 145, the authors offer the following reflection:

> Can the best neuroscientific evidence available today reduce or even rule out criminal responsibility? Many scientists, lawyers, defendants, and media representatives are already eagerly answering "yes." Others are enthusiastic that such evidence could be used by prosecutors to *establish* criminal responsibility. However, the utmost caution must be taken in making these claims because false conclusions are likely to cost real lives and livelihoods. As some of us have argued previously, the worth of neuroscience in criminal decisions is far from obvious, in part because there is not, and will never be, a brain correlate of responsibility.

a knife that cuts both ways. Unless one makes the fundamental psycholegal error of believing that causation *per se* excuses, it is clear that neuroscience might also be a means to inculpate.[22]

Perhaps more significantly, there already exist examples in the international community wherein criminal liability was founded on neuroimaging technology. In 2007, it was announced in Britain that convicted pedophiles must submit to MRI scans in order to measure the likelihood of re-offense.[23] In 2008, in India, two individuals were convicted of murder largely based upon Brain Electrical Oscillations Signature (BEOS), a form of "brain fingerprinting" using EEG electrodes to measure electrical signals in the brain. The purpose was to measure whether the accused had "experiential knowledge" of the events in question.[24] However, inclupatory use of MRI and EEG technology faces the same questions of scientific validity as does the

---

[22] Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 Ohio S. J. Crim. Law 397 (2006).

[23] Ben Leapman, *Crooks May Face 'Sci-Fi' Brain Scan*, The Daily Telegraph, Feb. 11, 2007, *available at* http://www.elegraph.co.uk/news/uknews/1542300/Crooks-may-face-%27sci-fi%27-brain-scan.html (last visited Sept. 20, 2009).

[24] Nitasha Natu, *This Brain Test Maps the Truth*, The Times of India, July 21, 2008, at 1; M. Raghava, *Stop Using Brain Mapping for Investigation and as Evidence*, The Hindu, Sept. 6, 2008, at 1; Anand Giridhardas, *India's Novel Use of Brain Scans in Courts is Debated*, The New York Times, Sept. 14, 2008, at A10.

exculpatory use proposed by the AMA/AACAP brief.[25]

Regarding *Daubert* admissibility, one final argument must be made concerning the position of the AMA/AACAP Brief. One leading author describes the position of AMA/AACAP Brief as "myth" and frames the position of the AMA/AACAP Brief as follows:

---

[25] There are additional areas of concern regarding the direction some neuroimaging research is heading, "lie detection" and "mind reading." *E.g.*, *see*, Paul S. Appelbaum, *The New Lie Detectors: Neuroscience, Deception, and the Courts*, 58 Psychiatric Services 460 (Apr. 2007); Charles N.W. Keckler, *Cross-Examining the Brain: A Legal Analysis of Neural Imaging for Credibility Impeachment*, 57 Hastings L.J. 509 (2006); Paul Root Wolpe, et al., *Emerging Neurotechnologies for Lie-Detection: Promises and Perils*, 5 Am. J. Bioethics 39 (2005); *Harrington v. Iowa*, 659 N.W.2d 509 (Iowa 2003); Daniel D. Langleben, et al., *Telling Truth From Lie in Individual Subjects With Fast Event-Related fMRI*, 26 Human Brain Mapping 262 (2005); F. Andrew Kozel, et al., *Detecting Deception Using Functional Magnetic Resonance Imaging*, 58 Biological Psychiatry 605 (2005); Richard G. Boire, *Searching the Brain: The Fourth Amendment Implications of Brain-Based Deception Detection Devices*, 5 Am. J. Bioeth. 62 (2005); Henry T. Greely, *Premarket Approval for Lie Detections: An Idea Whose Time May Be Coming*, 5 Am. J. Bioeth. 50 (2005); Daniel D. Langleben & Frank M. Dattilio, *Commentary: The Future of Forensic Functional Brain Imaging*, 36 J. Am. Acad. Psychiatry Law 502, 503 (2008), wherein the authors opine, "Mind-reading with fMRI is scientifically more challenging and even less developed than lie detection, yet it is of great interest and relevance to forensic psychiatry." Presumably, had the authors not meant "mind-reading" in the vernacular sense of the phrase, they would have chosen another, more accurate phrase.

- Executive function is mediated by areas in the prefrontal cortex.
- These areas are not functionally connected to other regions of the brain that are involved in emotional regulation, risk taking, or sensation seeking.
- The regions involved in emotional reactions do not begin to form functional connections with regions mediating executive function until the child is well into adolescence.
- We should therefore understand that certain types of "foolish" adolescent behavior occur as a result of immature or non-existent connections in these brain structures.[26]

The author points out that many aspects of this story that are *falsifiable*.[27] "Some parts of the myth hold up well, while other parts don't hold up at all."[28]

The author goes on to make the following points:

> First, it is not true that behaviors associated with executive function are unavailable to teenagers. . . . It is true that executive function can be dramatically improved as children evolve through puberty, which may be part of the myth's origin. . . . Behaviors like teenaged

---

[26] John J. Medina, *The Teenaged Brain: Part 1*, 26 Psychiatric Times 3 (2009).

[27] *See Daubert*, 509 U.S. at 593.

[28] Medina, *The Teenaged Brain: Part 1*, *supra*.

predilections toward sensation and risk-taking do not hold up as well, however.[29]

"Noninvasive imaging, such as fMRI, is a great and powerful technology, but it provides no easy answers in our quest to understand how the brain processes information."[30] "We are only in the beginning stages of our understanding of the relationship between adolescence and mental health."[31] "If we could only just discover what the psychiatric anomalies were telling us, we might have greater insight into what happens normally. Finally,

---

[29] *Id.* at 4 (emphasis added). The author explains:

> The idea is that regions in the brain naturally involved in reward-seeking should be more actively engaged in teenagers under tests that require reward seeking. They should then die down as the predilection for the behavior diminishes with age. The focus is usually on the nucleus accumbens and even the ventral tegmental areas, which makes sense, given their natural role in reward-seeking behavior. *Not everybody in the teenaged test cohorts shows such dramatic increases, however. Some researchers have actually found the opposite*—a decrease in blood flow associated with increased risk-taking behavior. *Some studies show increases to these areas in response to reward-seeking tasks, regardless of age.* There are also the normal "chicken and egg" questions that plague so much of this type of research. Does the increase in blood flow create the behavior, or does the behavior create the increase in blood flow?

[30] John J. Medina, *Functional Magnetic Resonance Imaging: Round 2*, 26 Psychiatric Times 5 (2009).

[31] John J. Medina, *The Teenaged Brain: Part 2*, 26 Psychiatric Times 1 (2009).

we might begin to understand what is going on in the minds of our adolescents—a hope no doubt echoed by every researcher interested in the biological basis of puberty."[32]

Accordingly, the scientific theory presented in the AMA/AACAP brief does not meet the standard for admissibility established by this Court.

III

THE COURT MAY NOT RELY ON UNCERTAIN SCIENTIFIC THEORY TO OVERRULE A LEGISLATIVE POLICY JUDGMENT

As demonstrated above, there is a wide-spread dispute amongst the scientific community regarding the validity of the theory regarding adolescent brain development propounded in the AMA/AACAP Brief. Since the scientific community is embroiled in controversy regarding the AMA/AACAP's assertions, these claims cannot serve as the unassailable basis of a legal or political decision regarding whether or not it is permissible to allow adolescents to be given terms of imprisonment of life without the possibility of parole. A decision to allow such sentences to be imposed, since it cannot depend solely on settled science, must be a matter of policy. This decision, then, should be committed to the federal or state legislatures since they are the competent policy making governmental entities with respect to the criminal law.

---

[32] *Id.* at 4.

The founders considered the legislative branch of their recently formed republican government to be vested with the discretion to make policy decisions regarding the development of law. *See, e.g.*, James Madison, *Helvidius No. 1*, *in* JAMES MADISON: WRITINGS 540-41 (2d ed. 1999) ("The natural province . . . of the legislature is to make laws."). On the other hand, the founders believed that the judiciary had a more limited role of applying the law to specific cases and review legislative and executive acts to the extent necessary to ensure that they were not inconsistent with the federal constitution. For example, Alexander Hamilton, in response to fears of judicial overreaching, drew attention to the founders' understanding that

> [t]he legislature not only commands the purse, but *prescribes the rules by which the duties and rights of every citizen are to be regulated*. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. *It may truly be said to have neither FORCE nor WILL, but merely judgment*; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

The Federalist, No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). According to founders, then, separation of the power to judge and the power to make law and policy was one character of the newly formed republic. Indeed, this separation of the judicial and legislative powers was something more

than a mere trait—it was an essential component for the success of republican enterprise. James Madison turned to "[t]he oracle who is always consulted and cited on this subject," the "celebrated" Montesquieu for the statement that "'[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for the judge would then be the legislator.'" *The Federalist*, No. 47, at 301-03 (James Madison).[33]

Of course, these statements by the Founders, were in reference to the *federal* judiciary and the *federal* legislature. However, the principle which they adamantly propound is equally applicable to judicial review of state legislative decisions. Even in reviewing state law, the federal judiciary must refrain from overreaching and making decisions of policy. Uncertain scientific theory cannot be the basis of a judicial decision to overrule a legislative policy judgment. It is the role of the state legislatures to balance policy concerns in deciding what the law should be.[34]

---

[33] The federal judiciary certainly retains the power "to pronounce legislative acts void, because contrary to the Constitution." *The Federalist*, No. 78 (Alexander Hamilton). However, this power is limited to cases where the legislative enactment truly contradicts the Constitution—the judiciary may not abrogate the legislative power as a policy making governmental entity.

[34] *See, e.g.*, Nathaniel Chipman, *Sketches of the Principles of Government* 120-27 (1793) (finding that while the federal judiciary and executive may present objections to laws proposed by the legislature, separation of powers requires that "the legislature must be the sole judges, whether the [objections of the judiciary and executive] given coincides with the general

— *continued* —

The founders' view that the policy making power should be vested in the legislature, rather than the judiciary, is recognized as well-settled law by the federal judiciary. Starting as far back as the famous case of *Marbury v. Madison*, this Court, even while establishing once and for all that the federal judiciary had the power to review Congress' acts for compliance with the Constitution, recognized that "[i]t is emphatically the province and duty of the judicial department to say what the law *is*" not what the law *should be*. *Marbury v. Madison*, 5 U.S. 137 (1803) (emphasis added). Since *Marbury*, this Court has frequently reiterated the legal rule that the federal judiciary is not "to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Rather, "'[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.'" *Id.* at 314 (quoting *Vance v. Bradley*, 440 U.S. 93 (1979)). This Court recognized the importance of the founders' belief that "a legislative choice is not subject to courtroom fact-finding." *Id.* at 313. The Court has further emphasized the importance of leaving policy decisions to legislatures "where the legislature must necessarily engage in a process of line-drawing." *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166,

---

interest of the community, and the principles of the government, or is dictated by particular views, or particular interests.")

179 (1980). If science has yet to reach the stage where such a question can be determined on the basis of medical tests, then undeniably, the decision to set the age limit, if any, at which a person no longer is constitutionally capable of receiving a term of life imprisonment without the possibility of parole is a decision which requires line-drawing.

A moment's consideration reveals the wisdom of leaving questions of policy to the legislative branches of our federal and state governments. First, legislatures are better equipped to weigh conflicting scientific evidence and propositions relevant to proposed statutory enactments. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 786-87 (1997) (Souter, J. concurring) (finding that legislatures "have more flexible mechanisms for factfinding than the Judiciary").

Second, legislatures are better able to experiment with the law in order to perfect it. *Id.* (emphasis added) "Not only do [legislatures] have more flexible mechanisms for factfinding than the Judiciary, *but their mechanisms include the power to experiment, moving forward and pulling back as facts emerge within their own jurisdictions*". In contrast, once the federal judiciary enacts a constitutional rule, it is difficult to modify that rule despite subsequent developments in science, law, or policy. *See, e.g., Glucksberg*, 521 U.S. at 720 ("By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action."). Hence, this Court has wisely adopted the rule that, if possible, the court will refrain from declaring a law unconstitutional. *See,*

e.g., *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (quoting *McGowan v. Maryland*, 366 U.S. 420 (1961) ("legislatures are presumed to have acted within their constitutional power"). The rule is particularly pertinent where, as in the case before the Court, the constitutionality of the law may depend upon a disputed science. This Court should neither be hasty to limit the state legislature's ability to experiment with the law nor risk creating a rift between developing science and law by establishing a permanent constitutional rule based on questioned science.

CONCLUSION

The scientific positions regarding adolescent brain development are in dispute. State legislatures should be free, therefore, to choose their own policy on whether to permit convicted adolescents to be sentenced to life imprisonment without the possibility of parole. State legislatures' policy-making powers allow them either to root this decision in either side of the disputed science regarding adolescent brain development or, alternatively, to reject both scientific positions as unsatisfactory and root their decisions on the basis of other policy interests. The point, however, is that—since no scientific principle definitively determines

whether or not such sentencing is constitutional—state legislatures are best suited to make the choice and should be left with the ability to do so.

DATED: September, 2009.

Respectfully submitted,

THE HONORABLE
EDWIN MEESE III
214 Massachusetts
Avenue NE
Washington, DC 20002
Telephone:
(202) 546-5400

JOHN C. EASTMAN
Center for
Constitutional
Jurisprudence
c/o Chapman University
School of Law
One University Drive
Orange, CA 92886

ANTHONY T. CASO
Counsel of Record
Law Office of
Anthony T. Caso
8001 Folsom Boulevard
Suite 100
Sacramento, CA 95826
Telephone: (916) 386-4432
Facsimile: (916) 307-5164

JONATHON SKILES
Of Counsel
2220 Tulare, Suite 1000
Fresno, CA 93721

STEWART HICKS
Of Counsel
921 11th Street, Suite 300
Sacramento, CA 95814

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JUL 23 2009
OFFICE OF THE CLERK

Nos. 08-7412 & 08-7621

IN THE

Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRITS OF CERTIORARI TO THE
DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF OF AMICUS CURIAE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF PETITIONERS

Of Counsel:
ANTHONY S. BARKOW
CENTER ON THE ADMINISTRATION OF CRIMINAL LAW
110 West Third Street
New York, NY 10012
(212) 998-6612

RICHARD K. WILLARD
Counsel of Record
CHRISTOPHER G. FALCONE
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-3000

Attorneys for Amicus Curiae

224066

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 6

ARGUMENT .....

I. AN EXAMINATION OF THE TEXT AND HISTORY OF THE EIGHTH AMENDMENT INDICATES THAT THE "CRUEL AND UNUSUAL PUNISHMENTS" CLAUSE WAS ORIGINALLY INTENDED TO PROHIBIT DISPROPORTIONATE CRIMINAL SENTENCES. 6

A. The Language and Source of the Eighth Amendment Prohibit All Forms of Disproportionate Punishment. 6

B. Evidence from the Ratification of the Bill of Rights Demonstrates the Existence of a Proportionality Requirement. 7

Contents

Page

II. EIGHTH AMENDMENT PROPORTIONALITY REVIEW IS NECESSARY TO PROTECT THE RIGHTS OF THE ACCUSED AND THE CONVICTED IN THE FACE OF EXPANDING CRIMINAL LAWS AND SENTENCES THAT CONCENTRATE CONTROL OVER SENTENCING IN THE HANDS OF PROSECUTORS. 18

A. Criminal Law and Sentences Have Expanded Dramatically in Recent Decades. 18

B. Only the Judiciary, not the Political Process, Can Provide a Counter-Weight to Disproportionate Sentences. 21

C. Control Over Sentencing Has Been Concentrated in the Hands of Prosecutors, Allowing Them to Threaten Disproportionate Prison Sentences and To Pressure Defendants into Waiving their Right to a Trial. 23

Contents

Page

III. THE COURT'S PRACTICE OF APPLYING A ROBUST PROPORTIONALITY REVIEW IN THE CAPITAL CONTEXT WHILE VIRTUALLY ELIMINATING PROPORTIONALITY REVIEW IN THE NONCAPITAL CONTEXT CANNOT BE JUSTIFIED. 27

A. Neither the Text of the Eighth Amendment nor the Differences Between Death and Other Forms of Punishment Justify the Court's Divergent Application of the Proportionality Principle in Capital and Noncapital Cases. 28

B. The Purported Difficulties in Administering a Proportionality Review for Noncapital Sentences Are Present in Many Other Areas of the Law in which the Court Routinely Applies Some Form of Proportionality Review. 31

CONCLUSION 38

TABLE OF CITED AUTHORITIES

Page

CASES

Atkins v. Virginia,
536 U.S. 304 (2002) 27

Barker v. Wingo,
407 U.S. 514 (1972) 38

BMW of North America, Inc. v. Gore,
517 U.S. 559 (1996) 34, 35

Bordenkircher v. Hayes,
434 U.S. 357 (1978) 24

Coker v. Georgia,
433 U.S. 584 (1977) 27

Cooper Industries, Inc. v. Leatherman Tool Group,
532 U.S. 424 (2001) 35

Enmund v. Florida,
458 U.S. 782 (1982) 27, 33

Ernst & Ernst v. Hochfelder,
425 U.S. 185 (1976) 15

Ewing v. California,
538 U.S. 11 (2003) 3, 27, 31

Cited Authorities

Page

Faretta v. California,
422 U.S. 806 (1975) 13

Ford v. Wainwright,
477 U.S. 399 (1986) 27

Furman v. Georgia,
408 U.S. 238 (1972) ..... *passim*

Harmelin v. Michigan,
501 U.S. 957, 1001 ..... *passim*

Harris v. United States,
536 U.S. 545 (2002) 26

Kennedy v. Louisiana,
128 S. Ct. 2641 (2008) 27

Ker v. State of Cal.,
374 U.S. 23 (1963) 36

Lockyer v. Andrade,
538 U.S. 63 (2003) 3

McCleskey v. Kemp,
481 U.S. 279 (1987) 27

Melendez-Diaz v. Massachusetts,
129 S.Ct. 2527, 2009 U.S. Lexis 4734 (2009) ... 37

Cited Authorities

Page

Ornelas v. United States,
517 U.S. 690 (1996) 36

Osborn v. Haley,
549 U.S. 225 (2007) 6

Pacific Life Ins. Co. v. Haslip,
499 U.S. 1 (1991) 35

People v. Lorentzen,
194 N.W.2d 827 (Mich. 1972) 37

People v. Miller,
781 N.E.2d 300 (Ill. 2002) 37

Roper v. Simmons,
543 U.S. 551 (2005) 27

Rummel v. Estelle,
445 U.S. 263 (1980) 3

Skinner v. Railway Labor Executives' Ass'n.,
489 U.S. 602 (1989) 36

Solem v. Helm,
463 U.S. 277 (1983) ..... *passim*

Stack v. Boyle,
342 U.S. 1 (1951) 6

Cited Authorities

	Page
State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408 (2003)	35
State v. Bonner, 577 N.W.2d 575 (S.D. 1998)	37
State v. Burgess, 475 So.2d 35 (La. Ct. App. 1985)	37
State v. Davis, 427 S.E.2d 754 (W. Va. 1993)	37
Thompson v. Oklahoma, 487 U. S. 815 (1988)	33
United States v. Angelos, 345 F. Supp. 2d 1227 (D. Utah 2004)	26
United States v. Armstrong, 517 U.S. 456 (1996)	24
United States v. Bajakajian, 524 U.S. 321 (1998)	6, 34
United States v. Booker, 543 U.S. 220 (2005)	37
Vernonia School District v. Acton, 515 U.S. 646 (1995)	36

Cited Authorities

Page

Wayte v. United States,
470 U.S. 598 (1985) 24

Weems v. United States,
217 U.S. 349 (1910) 2, 3, 15

CONSTITUTIONS

U.S. CONST. amend. VII 6

STATUTES

18 U.S.C. § 3559(c) 19

LEGISLATIVE MATERIALS

Anthony M. Kennedy, Hearings before a Subcommittee of the House Committee on Appropriations, 103d Cong., 2d Sess., 29 (Mar. 9, 1994) 26

Drug Mandatory Minimums: Are They Working?: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the House Comm. on Government Reform, 106th Cong. 144-53 (2000) (statement of John Roth, Chief, Narcotic and Dangerous Drug Section, Criminal Division, Dep't of Justice) 22

Cited Authorities

Page

Federal Cocaine Sentencing Policy: Hearing Before the Subcomm. on Crime and Drugs of the Senate Comm. on the Judiciary, 107th Cong. 16-33 (2002) (statement of Roscoe C. Howard, U.S. Attorney for the District of Columbia) 22

Penalties for White Collar Crime: Hearings Before the Subcomm. on Crime and Drugs of the Senate Comm. on the Judiciary, 107th Cong. 102 (2002) (statement of James B. Comey, Jr., U.S. Attorney, Southern District of New York) 22

Ricardo H. Hinojosa, Statement Before the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security 2 (June 26, 2007), *reprinted in* 19 FED. SENT. REPT. 335 19

BOOKS AND ARTICLES

4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 16-17 (1769) 7

Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, *in* IN THE NAME OF JUSTICE 43 (Timothy Lynch ed., 2009) 19

Cited Authorities

Page

Anthony F. Granucci, "*Nor Cruel and Unusual Punishments Inflicted:*" The Original Meaning, 57 CAL. L. REV. 839 (1969) 8

Brandon K. Appelgate et al., *Assessing Public Support for Three-Strikes-and-You're-Out Laws: Global Versus Specific Attitudes* 42 CRIME & DELINQ. 517 (1996) 23

C. Ronald Huff, *Wrongful Conviction: Causes and Public Policy Issues* 18 CRIM. JUST. 15 (Spring 2003) 25

Debora Schwartz and Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783 (1974) 15, 16

Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93 (1999) 23

Eric Slater, *Pizza Thief Receives Sentence of 25 Years to Life in Prison*, L.A. TIMES, Mar. 3, 1995 20

Cited Authorities

Page

Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing* 458CATO POL'Y ANALYSIS 1 (2002) 24

Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005) .. 4

Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111 (2007) 29

Excerpts from Principles for the Sentencing Systems: A Background Report, 18 Fed. Sent. R. 207 (2006) 20

Ian Weinstein, *Fifteen Years after the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87 (2003) 24

JAMES Q. WHITMAN, HARSH JUSTICE (2003) 20

JAMES STRAZELLA ET AL., TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N CRIMINAL JUSTICE SECTION, THE FEDERALIZATION OF CRIMINAL LAW, 7 (1998) ... 4

Cited Authorities

Page

Jeremy Travis, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY (2005) 21

John C. Coffee, *The Metastasis of Mail Fraud: The Continuing Story of the Evolution of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1 (1983) 4

JOHN S. BAKER JR., FEDERALIST SOC'Y FOR LAW & PUB. POL'Y, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION 12 (2004) 4, 18

John Stinneford, *The Original Meaning of "Unusual:" The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. L. REV. 1739 (2008) ..... *passim*

John Stuart Mill, *Parliamentary Debate on Capital Punishment Within Prisons Bill* (Apr. 21 1868) 30

Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice* 16 CRIME & JUST. 99 (1992) 23

Martha Bellisle, *Man Gets 25 Years to Life for Alleged Food Heist*, L.A. TIMES, Jul. 18, 1999 20

Cited Authorities

Page

Michael Tonry, *Determinants of Penal Policies* CRIME & JUST. 1 (2007) 19

PAUL J. HOFER & COURTNEY SEMISCH, EXAMINING CHANGES IN FEDERAL SENTENCING SEVERITY: 1980-1998, 2 FED. SENT. REP. 12 (1999) 20

Rachel Barkow, *Separation of Powers and Criminal Law*, 58 STAN. L. REV. 1021 (2006) 22

Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145 (2009) 29, 37

RANDALL MCGOWAN, LAW, CRIME, AND ENGLISH SOCIETY, 1660-1830 (2002) 18

RECENT CASE: Civil Disobedience - The Role of Judges - Ninth Circuit Affirms Mandatory Sentence. - *United States v. Hungerford*, 465 F.3d 1113 (9th Cir. 2006), 120 HARV. L. REV. 1988 (2006) 21

Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. Pa. L. Rev. 79 (2005) 25

Cited Authorities

Page

SARAH LAWRENCE ET AL., URBAN INST. JUST. POLICY CENTER, THE PRACTICE AND PROMISE OF PRISON PROGRAMMING 2 (2002) 20

Thomas G. Barnes, *Star Chamber Mythology*, 5 Am. J. Legal Hist. 1 (1961) 13

Tom Stacey, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY B. OF RTS. J. 475 (2005) 17, 22

Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681 (1998) 30

William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) 18, 19, 24

MISCELLANEOUS

Anthony M. Kennedy, Address at the American Bar Association Annual Meeting (August 9, 2003), *available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html* 21

Cited Authorities

Page

BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE 25

HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001) 29

Jennifer E. Walsh, Historical Guide to Controversial Issues in America, Three Strikes Laws xvi (2007) 19

MAGNA CARTA (1215) 8

OXFORD ENGLISH DICTIONARY ONLINE (2d ed. 1989) 7, 12

PATRICK HENRY, SPEECH TO THE VIRGINIA RATIFYING CONVENTION FOR THE UNITED STATES CONSTITUTION (June 9, 1788), *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION IN PHILADELPHIA, 1787 (Jonathan Elliot ed., 2d ed. 1881) ..... *passim*

Racial Conflict, *in* ENCYCLOPEDIA OF AMERICAN PRISONS 379 (Marilyn D. McShane & Frank P. Williams III eds., 1996) 29

U.S. SENTENCING COMM'N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 25

BRIEF OF THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE[1]

Amicus curiae the Center on the Administration of Criminal Law ("the Center") is dedicated to defining and promoting best practices in the administration of criminal justice through academic research, litigation, and participation in the formulation of public policy.

The Center's litigation component aims to use its empirical research and experience with criminal justice and prosecution practices to assist in important criminal justice cases in state and federal courts throughout the United States. The Center's litigation program focuses on cases in which the exercise of prosecutorial discretion raises significant substantive legal issues. Because the misuse of prosecutorial discretion can and has resulted in the imposition of cruel and unusual punishments, the Center participates in cases to encourage the judiciary to check prosecutors by performing its constitutionally mandated task of enforcing the Eighth Amendment. The Center's Faculty Director is a nationally-recognized expert on

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution intended to fund its preparation or submission. The respondent has filed a blanket waiver in both cases. The petitioners have consented to the filing of this brief and such consent is being lodged herewith.

sentencing and criminal law, and the Center's Executive Director is a former federal prosecutor who worked for 12 years in the United States Attorneys' Offices for the Southern District of New York and the District of Columbia and in the United States Department of Justice.

The Center files this amicus brief out of concern that the absence of meaningful substantive review of noncapital sentences, the continued proliferation nationwide of excessively harsh and often mandatory sentences, and the fact that virtually all criminal cases are resolved by plea and not by trial have created significant imbalances in the criminal justice system. These imbalances, combined with the concentration of power in the hands of prosecutors, pose barriers to the fair administration of criminal justice. The Center respectfully submits that this Court should hold that the sentences imposed in these cases are unconstitutionally excessive and invigorate substantive review of noncapital sentences in order to fulfill the mandate of the Eighth Amendment and restore rationality and proportionality to the criminal justice system in the United States.

SUMMARY OF THE ARGUMENT

This Court first held that the Eighth Amendment prohibits disproportionate noncapital sentences nearly a hundred years ago in *Weems v. United States*, 217 U.S. 349 (1910). The Court strongly reaffirmed this principle in the majority opinion of *Solem v. Helm* when it held that "[t]he common-law principle [of proportionality] incorporated into the Eighth Amendment clearly applied to prison terms." 463 U.S. 277, 289 (1983). Since then,

the Court has consistently recognized the Eighth Amendment prohibition on disproportionate sentences.[2]

Although some members of the Court suggested, in *Ewing*, that a prison term can never violate the Eighth Amendment, *Ewing* 538 U.S. 11 at 21-22, 28-30 (2003), the elimination of proportionality review in the noncapital context would be inconsistent with the Eighth Amendment's text and original meaning, the Amendment's text prohibits excessive bail or fines, as well as cruel and unusual punishments. There has been a debate within the Court and among scholars concerning the original meaning of the Eighth Amendment. However, drawing on English and early American legal history, this Court has held that the Amendment was intended to prohibit *all* punishments – including terms of incarceration – that are unwarranted by the nature of the offense committed or the character of the offender. *See Weems v. United States*, 217 U.S. 349, 366-81 (1910); *Solem v. Helm*, 463 U.S. 277, 284-90 (1983); *see also Rummel v. Estelle*, 445 U.S. 263, 287-88 (1980) (Powell, J. dissenting). A close examination of the text and history of the Amendment supports this conclusion.

Now more than ever, citizens need the protection of the Eighth Amendment. In the past few decades, both major political parties have aggressively sought the label of "tough on crime." The result has been a proliferation of new criminal laws, many of which are written so broadly that they cover cases that were not within the

---

[2] *See Lockyer v. Andrade*, 538 U.S. 63, 72 (2003).

intent of the legislature.[3] In addition to dramatically expanding the scope of behavior covered by criminal law, legislators have adopted increasingly harsher punishments. They have done so through a variety of mechanisms, including mandatory minimums and three-strikes laws that shift control over sentencing away from the judiciary and to prosecutors who determine who gets these sentences through their charging decisions. Judicial control over sentencing is further reduced because these broad and harsh laws give prosecutors the ability to leverage defendants into guilty pleas. In fact, many laws include punishments that no one thinks are appropriate in many of the cases to which they apply. Instead, these laws often contain inflated punishments that are included to create leverage for prosecutors to secure guilty pleas and cooperation. Enforcing the Eighth Amendment prohibition against disproportionate sentences would provide needed protection in those cases where laws are inappropriately applied and yield sentences in excess of what is proportionate to the crime committed or to the particular offender's culpability.

There is already an existing model for this kind of enforcement of the Eighth Amendment. The Court has

---

[3] *See* JOHN S. BAKER JR., FEDERALIST SOC'Y FOR LAW & PUB. POL'Y, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION 12 (2004); JAMES STRAZELLA ET AL., TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N CRIMINAL JUSTICE SECTION, THE FEDERALIZATION OF CRIMINAL LAW, 7 (1998); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 724 (2005); John C. Coffee, *The Metastasis of Mail Fraud: The Continuing Story of the Evolution of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1, 19 (1983).

consistently applied a robust proportionality principle in the context of capital sentencing. There is no good reason to confine a vigorous application of the Eighth Amendment to capital cases. The text of the Eighth Amendment certainly does not distinguish between capital punishments and other forms of punishment. The Court has often emphasized the differences between the death penalty and other forms of punishment, but the only real difference is that death is a more severe punishment. This difference does not justify providing Eighth Amendment protections to defendants in capital cases while denying them to all others.

The Court has also pointed to potential difficulties in administering a proportionality review in noncapital cases as a reason for its unwillingness to apply a proportionality principle to noncapital sentences. However, in many other contexts – including cases involving fines, punitive damages, and capital punishment – the court has often applied proportionality tests that are no easier to administer than a proportionality test that covers terms of incarceration. There is no justification for singling out incarceration as the only type of punishment that escapes judicial review.

Because application of a proportionality principle to noncapital sentences is mandated by the text and original meaning of the Eighth Amendment, the Court, in the present case, should return to the robust proportionality review it adopted in *Solem v. Helm*.

ARGUMENT

I. AN EXAMINATION OF THE TEXT AND HISTORY OF THE EIGHTH AMENDMENT INDICATES THAT THE "CRUEL AND UNUSUAL PUNISHMENTS" CLAUSE WAS ORIGINALLY INTENDED TO PROHIBIT DISPROPORTIONATE CRIMINAL SENTENCES.

The text of the "Cruel and Unusual Punishments" Clause of the Eighth Amendment prohibits all forms of disproportionate punishment, including terms of imprisonment. And the enactment history of the Clause – which comes directly from the English Bill of Rights – strongly supports the view that its ban on cruel and unusual punishment was meant to outlaw punishments that, while permissible in some circumstances, are disproportionate for the offense at hand.

A. The Language and Source of the Eighth Amendment Prohibit All Forms of Disproportionate Punishment.

The Eighth Amendment states that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VII. The prohibitions on "excessive bail" and "excessive fines" mandate a proportionality review.[4] The prohibition on "cruel and unusual punishments" is *in pari materia*[5] with the bail and fines clauses and thus

---

[4] *See, e.g., Stack v. Boyle*, 342 U.S. 1, 5 (1951); *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

[5] *Osborn* v. *Haley*, 549 U.S. 225, 263 (2007).

also mandates proportionality review. Indeed, the Court has recognized that the Eighth Amendment imposes "'parallel [proportionality] limitations' on bail, fines, and other punishments." *Solem v. Helm*, 463 U.S. 277, 289 (1983) (quoting *Ingraham v. Wright*, 430 U.S. 651, 664 (1977)).

This interpretation also comports with the commonly understood meanings of "cruel" and "unusual" at the time of the Framing. The word "cruel" was often used as a synonym for severe or excessive.[6] The word "unusual" was used interchangeably with the word "illegal."[7] Illegality in this context meant legal practices contrary to "long usage," or innovations outside of established common or customary law.[8] During the colonial period, common law often operated as a legal minimum, similar to *jus cogens* in international law, preventing legislation from violating longstanding, customary legal principles.[9] Legislation that violated established common law principles was considered

---

[6] *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 16-17 (1769) (describing punishments of "unreasonable severity" Blackstone uses the word "cruel" as a synonym for severe or excessive); *see also* OXFORD ENGLISH DICTIONARY ONLINE "cruel" (2d ed. 1989) (hereinafter "OED") (citing a 1710 definition of cruel as "severe, hard"), www.oed.com.

[7] *Harmelin v. Michigan*, 501 U.S. 957, 970-74 (1991).

[8] *See generally* John Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. L. REV. 1739 (2008).

[9] *See id.* at 1765.

"unusual" in this sense, and thus void.[10] This concept was at the heart of the American Revolution. Colonists claimed legal justification for independence from Parliament's repeated violation of common law rights to representation and trial by jury, the same rights memorialized in the Constitution.[11] Thus, to the extent that "unusual" is synonymous with "illegal," the illegality referred to was the violation of longstanding common law norms, not the lack of statutory authorization. Thus, interpreting the terms together, the "cruel and unusual punishments" prohibited by the Bill of Rights were severe or excessive punishments that broke from longstanding, inviolable common law tradition.

The common law prohibition "against excessive punishment," in any form, originated with the Magna Carta.[12] Historical evidence suggests that the common law proportionality principle was codified in the English Bill of Rights in response to the disproportionate punishment of Titus Oates.[13] A dissent accompanying the rejection of Oates' appeal stated that "there is no precedent to warrant the punishment of whipping and

---

[10] *See id.* at 1795 (citing objections to Parliament's actions as "unusual" and "void" because contrary to "common right or reason").

[11] *Id.* at 1794-96.

[12] Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted"*: The Original Meaning, 57 CAL. L. REV. 839, 845 (1969); *see also* MAGNA CARTA ch. 20-22 (1215) (describing regulations on excessive and oppressive punishment through fines).

[13] *See id.* at 852-860.

committing to prison for life *for the crime of perjury*."[14] Thus, in the context of the Oates case, "cruel and unusual" referred to the severity of the punishment in relation to the crime, not to the method of punishment. Therefore, the meaning of the English Bill of Rights provision on which the Eighth Amendment was modeled supports its application to excessive sentences of imprisonment.

B. Evidence from the Ratification of the Bill of Rights Demonstrates the Existence of a Proportionality Requirement.

The history of the Constitution's ratification, including debate notes from both the Virginia Convention and the First Congress, demonstrate that the Eighth Amendment includes a proportionality requirement. Although the historical record contains few specific references to the "Cruel and Unusual Punishments" Clause, disagreements between Federalists and Anti-Federalists concerning the need for a Bill of Rights offer insight into the abuses that the Amendments, including the Eighth Amendment, aimed to prevent. Additionally, the ratification debate in the First Congress illuminates the Members' understanding of the language of the Amendment. Examined in context, both show that the "Cruel and Unusual Punishments" Clause includes a proportionality requirement analogous to English common law.

The best evidence of why state legislatures decided to demand the Amendment comes from

---

[14] *Harmelin v. Michigan*, 501 U.S. 957, 971 (1991) (Scalia, J.).

transcripts of the Virginia ratification convention.[15] Anti-Federalist resistance to ratification of the Constitution stemmed largely from concerns over the new federal government's potential for abuse of common law civil rights.[16] Patrick Henry and George Mason led the Anti-Federalist attack on ratification, going through the Constitution line-by-line and arguing that it gave the federal government powers unknown at common law that would lead to "new and unusual experiments in government."[17] Henry focused on several instances of federal government power to institute "unusual punishments," including the danger of using the treaty and militia power for law enforcement purposes.[18] Most importantly, Anti-Federalists highlighted the danger of the federal government's criminal prosecutorial power due to a lack of either common law limitations or a bill of rights.[19] Henry's argument for the addition of the Bill of Rights and specifically the Eighth Amendment hinged on protecting citizens from both harsh punishments and disproportionate sentences:

---

[15] Stinneford, *supra* note 8, at 1803-10.

[16] *Id.* at 1803.

[17] PATRICK HENRY, SPEECH TO THE VIRGINIA RATIFYING CONVENTION FOR THE UNITED STATES CONSTITUTION (June 9, 1788), *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION IN PHILADELPHIA, 1787, at 172 (Jonathan Elliot ed., 2d ed. 1881) (hereafter "Elliot's Debates").

[18] Stinneford, *supra* note 8, at 1804-1806.

[19] 3 Elliot's Debates, at 447.

> In this business of legislation, your members of Congress will loose [sic] the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors? That they would not admit of tortures, *or* cruel and barbarous punishment. But Congress *may introduce the practice of the civil law, in preference to that of the common law.* They may introduce the practice of France, Spain, and Germany of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a *criminal equity*, and extort confession by torture, *in order to punish with still more relentless severity.*[20]

Henry's speech supports proportionality as part of the "Cruel and Unusual Punishments" Clause in two ways. First, the passage supports the view that the Framers meant the Eighth Amendment to preserve common law protections associated with law enforcement. Second, the passage references not only limiting *types* of punishment, but also controlling the *severity* of that punishment.

---

[20] *Id.* at 447-48 (emphases added).

Henry and the other Anti-Federalists feared that supplanting common law protections of individual liberties with legislation would lead the government to adopt extreme punishments.[21] Henry saw civil law systems, like France and Germany, and common law systems with parliamentary superiority, like Great Britain, as punishing unreasonably and with "relentless severity."[22] Based on that fear, Henry stressed the need to prevent Congress from disregarding the common law protections that ensured fair trial procedures and the reasonable punishment of criminals.[23]

Henry therefore advocated on behalf of the "Cruel and Unusual Punishments" Clause, and in doing so, he emphasized both the type and severity of punishments. He spoke of the need to disallow "tortures, *or* cruel and barbarous punishment." Speaking of "tortures" *or* "cruel and barbarous punishments" in the disjunctive makes clear they are two separate issues. Tortures were those punishments causing extreme physical or mental pain. "Cruel and barbarous punishments," in contrast, were inflictions of overly severe sentences.[24] Henry argued that failing to codify common law protections through a Bill of Rights would leave citizens susceptible to both.

---

[21] Stinneford, *supra* note 8, at 1807.

[22] *Id.* (citing 3 Elliot's Debates, at 448).

[23] *Id.*

[24] *See* OED, *supra* note 6 (defining "torture" as "causing physical or mental suffering" and defining "barbarous" as "uncivilized" or "cruelly harsh").

Henry's support of proportionality is further evidenced by his fear of establishing an American institution of "criminal equity."[25] This statement references the Star Chamber, a court in England that could punish arbitrarily and severely without common law limitations.[26] The Framers knew the abuses of the Star Chamber through both history and reputation: trials were closed, conducted without juries, and no appeals were available.[27] Notably, the problem with Star Chamber punishments was not the *method* of those punishments; the abuses came from the sentences' arbitrary and disproportionate *severity*.[28] The Star Chamber tried only misdemeanors but punishments included heavy fines, mutilation, perpetual imprisonment, or some combination of these.[29] When Henry's speech at the Virginia Convention denounced the possibility of federal courts of "criminal equity," his fear was not only the type of punishments inflicted, but also arbitrary punishment of minor crimes through disproportionate sentences, including perpetual imprisonment.[30] The "criminal equity" of the Star Chamber,

---

[25] Elliot's Debates, at 448.

[26] *See Faretta v. California*, 422 U.S. 806, 821 n. 18 (1975) (discussing the case of William Prynne, whose Star Chamber libel conviction led to the "monstrous" sentence of legal disbarment, deprivation of his university degrees, pillorying, cutting off ears, perpetual imprisonment without pen or paper, and a fine).

[27] *Id.* at 821.

[28] *Id.*

[29] Thomas G. Barnes, *Star Chamber Mythology*, 5 Am. J. Legal Hist. 1, 4, 7 (1961).

[30] Elliot's Debates, at 448.

with its harsh punishment of misdemeanors, epitomized the "relentless severity" that Henry hoped the Eighth Amendment would curtail.[31]

Henry, Mason, and other Anti-Federalists argued so strongly against ratification that the Federalists compromised, agreeing to recommend a bill of rights along with ratification.[32] Immediately after ratification, a committee was formed, including Henry and Mason, to draft proposed amendments to the Constitution.[33] The Committee proposed amendments that included almost the entire contents of the Virginia Declaration, including the "Cruel and Unusual Punishments" Clause.[34] Other states followed Virginia's lead, each recommending a bill of rights without debate.[35] Congress discussed the Eighth Amendment only briefly before ratification, but the available evidence suggests a broad consensus that the Amendment was designed to codify the prohibition on harsh and disproportionate punishment.

The debate over the Bill of Rights focused only momentarily on the "Cruel and Unusual Punishments" Clause.[36] Only two members of Congress, Representatives Livermore and Smith, made remarks on the Amendment

---

[31] *Id.*

[32] Stinneford, *supra* note 8, at 1807-08.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 1808.

[36] *Id.* at 1809.

and only one of these was substantive.[37] Livermore stated that the Clause "seems to have no meaning in it" and questioned whether a ban on "cruel" punishments would prevent the Congress from passing harsh sentences, commenting that "villains often deserve whipping, and perhaps to have their ears cut off."[38] Smith simply made a brief objection, arguing that the Clause was too "indefinite."[39] After Smith's comment, the Amendment passed by an overwhelming margin and without further debate or modification.[40] Although the remarks of Smith and Livermore are the only remarks concerning the Eighth Amendment from the congressional debate that are available, because both were opponents of the Eighth Amendment[41] their statements should be given little interpretive weight.[42]

Far more informative are the views of some of the most influential Founders who were strong advocates of proportionality.[43] Thomas Jefferson authored and

---

[37] *Id.*

[38] *Furman v. Georgia*, 408 U.S. 238, 262 (1972) (Brennan, J., concurring) (quoting 1 ANNALS OF CONG. 754 (Joseph Gales ed., 1789)).

[39] *Id.* at 244.

[40] Stinneford, *supra* note 8, at 1810.

[41] *See Weems v. United States*, 217 U.S. 349, 368-69 (1910).

[42] *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 204 n.24 (1976).

[43] *See* Debora Schwartz and Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 818-19, 822 (1974).

introduced to the Virginia Legislature, "A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital."[44] This bill limited capital punishment to a few heinous offenses and established a scale of penalties, carefully proportioned to the offense.[45] Like Jefferson, Benjamin Franklin also believed strongly in proportionality.[46] In a letter to Benjamin Vaughan, Franklin objected to what he viewed as disproportionate punishments contained in English law.[47] He said, "[t]o put a man to Death for an Offense which does not deserve Death, is it not Murder?" [48] In light of their strong support of proportionality, Jefferson and Franklin must have believed that the Eighth Amendment protected against disproportionate punishment – as Henry said it would. Otherwise, neither would have refrained from speaking upon the Amendment's passage in the face of Livermore's and Smith's comments.

Further support for this reading comes from the fact that, upon the Amendment's enactment, the Congress crafted penal laws that adhered to and reflected the Clause's commitment to proportionality. The United States' first criminal code included only four capital crimes: murder, treason, forgery of U.S. securities, and

---

[44] *Id.* at 818.

[46] *Id.*

[45] *Id.* at 822.

[47] *Id.*

[48] *Id.*

piracy.[49] Although the death sentence for forgery of U.S. securities or piracy may seem extreme today, the proportionality principle is apparent when one examines the code in its entirety. Piracy was punishable by death, but confederacy with a pirate was only punishable by up to three years imprisonment.[50] Similarly, the code prescribed death for treason but a maximum of seven years for failing to inform authorities of the treason of another.[51] Sentences for crimes as serious as maiming someone on federal property, manslaughter on federal property, perjury and altering judicial records ranged from three to seven years in prison.[52] A large scale theft committed in the course of piracy was punishable by death, but simple theft of federal property did not even carry a prison sentence: offenders received a fine and up to thirty-nine lashes.[53] Compared to the "Bloody Code" of England, which sentenced defendants to death for even the smallest offense, the United States code

---

[49] Tom Stacey, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY B. OF RTS. J. 475, 517-18 & n.234 (2005) (noting that theft of goods or a ship was only punishable by death if linked to mutiny or piracy, an act that "was the eighteenth century's terrorism.").

[50] *Id.* at 518 n.235 (citing Act of Apr. 30 1790, ch. 9 §§ 8, 12, 1 Stat. 112, 113-15 (1845)).

[51] *Id.* (citing Act of Apr. 30 1790, ch. 9 §§ 1-2, 1 Stat. 112 (1845)).

[52] *Id.* (citing Act of Apr. 30 1790, ch. 9 §§ 3,7,13, 15, 18, 22, 1 Stat. 112, 113,115-117 (1845)).

[53] *Id.* (citing § Act of Apr. 30 1790, ch. 9 § 8, 16, 1 Stat. 112, 113-14, 116 (1845)).

was reasonable and proportional.[54] The First Congress, in limiting the death penalty to four crimes and making the others punishable by reasonable prison terms, thus acted consistently with the prevailing view of the time that punishments should be proportionate. And that same view is reflected in the text of the Eighth Amendment.

II. EIGHTH AMENDMENT PROPORTIONALITY REVIEW IS NECESSARY TO PROTECT THE RIGHTS OF THE ACCUSED AND THE CONVICTED IN THE FACE OF EXPANDING CRIMINAL LAWS AND SENTENCES THAT CONCENTRATE CONTROL OVER SENTENCING IN THE HANDS OF PROSECUTORS.

A. Criminal Law and Sentences Have Expanded Dramatically in Recent Decades.

The past few decades have seen a dramatic expansion in criminal laws and the harshness of the punishment associated with those laws. There are more than 4,000 criminal offenses in the United States Code.[55] State codes are somewhat narrower, but not much.[56]

---

[54] *See* RANDALL MCGOWAN, LAW, CRIME, AND ENGLISH SOCIETY, 1660-1830, 117-21 (2002) (describing the development of the English penal code that by 1819 made 223 crimes punishable by death).

[55] *See* JOHN S. BAKER JR., FEDERALIST SOC'Y FOR LAW & PUB. POL'Y, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION 12 (2004).

[56] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507, 516-517 (2001).

Judge Kozinski has observed that criminal law has expanded to the point that virtually every American could be considered a criminal.[57] As a result of this expansion in criminal law, state and federal codes are filled with overlapping crimes. This allows individuals to be charged with numerous offenses for a single act, thereby increasing the potential prison sentence for any given act.[58]

Prison sentences have also been increased through more direct action. Mandatory minimums and three-strikes laws have been particularly popular. By 1994, every state and the District of Columbia had enacted some version of a mandatory minimum sentencing law.[59] There are now at least 171 mandatory minimum provisions in federal criminal statutes, affecting roughly 10 percent of the federal prison population.[60] The federal government and over half the states have passed three-strikes laws.[61]

---

[57] Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, *in* IN THE NAME OF JUSTICE 43, 43-44 (Timothy Lynch ed., 2009).

[58] *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 517-18 (2001).

[59] Michael Tonry, *Determinants of Penal Policies*, 36 CRIME & JUST. 1, 27 (2007).

[60] Ricardo H. Hinojosa, Statement Before the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security 2 (June 26, 2007), *reprinted in* 19 FED. SENT. REPT. 335.

[61] 18 U.S.C. § 3559(c); Jennifer E. Walsh, Historical Guide to Controversial Issues in America, Three Strikes Laws xvi (2007); Michael Tonry, *Determinants of Penal Policies*, 36 CRIME & JUST. 1, 27 (2007).

These trends have resulted in significantly longer prison sentences. In the period from 1984 to 1993, actual time spent in prison for narcotics offenses nearly tripled.[62] During the same period, sentences for violent crimes doubled while sentences for firearms offenses nearly tripled.[63] The average prison sentence imposed for all federal crimes more than doubled from 1984 to 2002.[64] In the extreme, mandatory minimums and three-strikes laws have resulted in defendants receiving sentences as severe as 25 years to life for offenses as minor as stealing a piece of pizza or breaking into a church to steal bread.[65]

The increased scope and harshness of criminal laws has contributed to a tripling of the percentage of Americans in prison over the last three decades.[66] The

---

[62] PAUL J. HOFER & COURTNEY SEMISCH, EXAMINING CHANGES IN FEDERAL SENTENCING SEVERITY: 1980-1998, 2 FED. SENT. REP. 12 (1999) at 14-16.

[63] *Id.*

[64] *Excerpts from Principles for the Sentencing Systems: A Background Report*, 18 Fed. Sent. R. 207 (2006) (*citing* U.S. SENTENCING COMM'N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 30, fig. D; U.S. SENTENCING COMM'N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 378 (1991)).

[65] *See* Eric Slater, *Pizza Thief Receives Sentence of 25 Years to Life in Prison*, L.A. TIMES, Mar. 3, 1995, at B3; Martha Bellisle, *Man Gets 25 Years to Life for Alleged Food Heist*, L.A. TIMES, Jul. 18, 1999, at A1.

[66] See, e.g., JAMES Q. WHITMAN, HARSH JUSTICE 70-74 (2003); SARAH LAWRENCE ET AL., URBAN INST. JUST. POLICY CENTER, THE PRACTICE AND PROMISE OF PRISON PROGRAMMING 2 (2002).

United States incarcerates nearly seven times more people per capita than Europe[67] and has the harshest prison sentences of any Western democracy.[68] In short, as Justice Kennedy has said, "Our resources are misspent, our punishments are too severe, our sentences too long."[69]

B. Only the Judiciary, not the Political Process, Can Provide a Counterweight to Disproportionate Sentences.

Only the Judiciary, via proportionality review, can provide a counterweight to disproportionate sentences. The legislative process plays no such role. Legislators have little incentive to account for the interests of criminal offenders. Offenders yet to be caught are obviously unlikely to identify themselves in order to lobby for narrower criminal definitions or shorter prison sentences. Those already convicted of a crime are an even weaker political group. In many states, felons are disabled from voting.[70] In addition, the stigma of criminal

---

[67] *RECENT CASE: Civil Disobedience - The Role of Judges - Ninth Circuit Affirms Mandatory Sentence. - United States v. Hungerford, 465 F.3d 1113 (9th Cir. 2006)*, 120 Harv. L. Rev. 1988, 1993 n.35 (citing Bruce Western & Becky Pettit, *Mass Imprisonment, in* PUNISHMENT AND INEQUALITY IN AMERICA 14-15 & fig.1.2. (2006).

[68] *See* JAMES Q. WHITMAN, HARSH JUSTICE 57-58 (2003).

[69] Anthony M. Kennedy, Address at the American Bar Association Annual Meeting (August 9, 2003), *available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.*

[70] Jeremy Travis, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 255-56 (2005).

conviction prevents criminals from forming interest groups or from partnering with other coalitions to influence political outcomes.[71] In contrast, there are various powerful groups in favor of broader and harsher criminal laws, including prosecutors, companies involved in running prisons, prison employee unions, and victims' rights groups.[72]

Significantly, the sentences that emerge from this legislative process are often harsher when applied to individual cases than legislators, the public, and even prosecutors would desire when they support these general laws. Prosecutors lobby for punishments that will give them leverage to induce guilty pleas and cooperation,[73] instead of supporting those tailored to achieve fair results in each individual case. Politicians

---

[71] *See* Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL OF RTS. J. 475, 527 (2005).

[72] Rachel Barkow, *Separation of Powers and Criminal Law*, 58 STAN. L. REV. 1021, 1029 (2006).

[73] *See, e.g.*, *Federal Cocaine Sentencing Policy: Hearing Before the Subcomm. on Crime and Drugs of the Senate Comm. on the Judiciary*, 107th Cong. 16-33 (2002) (statement of Roscoe C. Howard, U.S. Attorney for the District of Columbia); *Penalties for White Collar Crime: Hearings Before the Subcomm. on Crime and Drugs of the Senate Comm. on the Judiciary*, 107th Cong. 102 (2002) (statement of James B. Comey, Jr., U.S. Attorney, Southern District of New York); *Drug Mandatory Minimums: Are They Working?: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the House Comm. on Government Reform*, 106th Cong. 144-53 (2000) (statement of John Roth, Chief, Narcotic and Dangerous Drug Section, Criminal Division, Dep't of Justice).

typically design laws to apply to the worst offenders (often those that have been the subject of media attention), rather than to all cases to which the sentence will apply.[74] As a result, sentences in individual cases are often greater than necessary and far exceed the length of sentence the electorate would actually want under the circumstances. Indeed, empirical studies demonstrate that sentences imposed often exceed the public's expectations and sense of fairness.[75] For example, one study found that, although a majority of Ohio respondents supported a three-strikes law, only a small minority believed that the life sentence required by the law was appropriate when faced with specific factual situations.[76] It is up to judges enforcing the Eighth Amendment to correct these failings.

C. Control Over Sentencing Has Been Concentrated in the Hands of Prosecutors, Allowing Them to Threaten Disproportionate Prison Sentences and To Pressure Defendants into Waiving their Right to a Trial.

The dramatic expansion of criminal law and the increased severity of penalties have shifted control over sentencing away from judges and to prosecutors. This

---

[74] *See* Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 107 (1999).

[75] *See* Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 CRIME & JUST. 99, 101, 122, 150, 152 (1992).

[76] Brandon K. Appelgate et al., *Assessing Public Support for Three-Strikes-and-You're-Out Laws: Global Versus Specific Attitudes*, 42 CRIME & DELINQ. 517, 528-30 (1996).

Court has held that a prosecutor's decisions regarding charging and plea bargaining are almost entirely discretionary.[77] For example, the Court upheld a prosecutor's decision to offer the defendant a sentence of five years in prison if he pleaded guilty but to seek a sentence of life imprisonment pursuant to a recidivist statute if the defendant chose to go to trial. *Bordenkircher v. Hayes*, 434 U.S. 357, 358-359 (1978). Armed with mandatory minimums, three-strikes laws and overlapping criminal statutes, prosecutors are free to threaten much more severe prison sentences than they were just a few decades ago.[78]

Prosecutors can use these overlapping laws and mandatory minimums to threaten defendants with extreme sentences and pressure them into plea bargains, essentially removing judges from the sentencing process.[79] Indeed, the prospect of a long

---

[77] *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."); *Wayte v. United States*, 470 U.S. 598, 608 (1985) (courts are "properly hesitant to examine the decision whether to prosecute").

[78] *See* Ian Weinstein, *Fifteen Years after the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 104-05 (2003).

[79] *See, e.g.*, Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, 458 CATO POL'Y ANALYSIS 1, 9-10, 17 (2002); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 531 (2001).

sentence would likely pressure even an innocent defendant into accepting a plea bargain to avoid the risk of much longer sentence after a trial.[80]

Recent statistics indicate that prosecutors are using this increased power. The percentage of defendants pleading guilty has risen substantially over the past few decades as potential prison sentences have increased.[81] The most recent figures from the U.S. Sentencing Commission indicate that over 96% of federal cases end in guilty pleas and that in some districts, the rate exceeds 99%.[82]

The small number of defendants that do risk trial often cannot rely on judicial discretion to avoid grossly

---

[80] A recent study by Professor Ronald Wright argues that the data indicate that defendants are likely abandoning meritorious trial defenses because of the steep sentencing discount they receive for pleading guilty. *See generally* Ronald F. Wright, Trial Distortion and the End of Innocence in Federal Criminal Justice, 154 U. Pa. L. Rev. 79 (2005). *See also* C. Ronald Huff, *Wrongful Conviction: Causes and Public Policy Issues*, 18 CRIM. JUST. 15, 17 (Spring 2003).

[81] In 2007 the percentage of defendants in U.S. district courts pleading guilty or nolo contendere, excluding those cases that were dismissed, was approximately 95.7%. In 1977, only about 81.7% of such defendants plead guilty or nolo contendere. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl. 5.22, *available at http://www.albany.edu/sourcebook/pdf/t5222007.pdf*.

[82] U.S. SENTENCING COMM'N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at tbl.10, *available at http://www.ussc.gov/ANNRPT/2008/Table10.pdf*.

disproportionate sentences. Mandatory sentences designed primarily to encourage pleas, but not to apply to individual cases after trial, force judges to impose sentences they believe are "unjust, cruel and irrational."[83] By giving prosecutors the tools to threaten extreme prison sentences and tying the hands of judges in the few cases that do go to trial, legislators have concentrated power in prosecutors and made judges far less relevant in determining sentences. Prosecutors could seek fairer, more proportionate sentences for those defendants that choose to go to trial rather than advocating for the harsher sentences designed to induce guilty pleas. But this possibility is more theoretical than real. If prosecutors threaten long sentences in plea negotiations and then seek shorter sentences at trial, the threat of the longer sentence would lose credibility as a bargaining technique. Thus, if prosecutors threaten defendants with sentences that even they believe are too lengthy in an effort to secure a plea with a sentence they think is appropriate, they will not later be in a position to seek a shorter, more appropriate sentence after trial. They have to live up to their threats if they want to maintain their institutional credibility. As a result, for the small percentage of defendants who do

---

[83] *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004) (Cassell, J.); *see also* Anthony M. Kennedy, Hearings before a Subcommittee of the House Committee on Appropriations, 103d Cong., 2d Sess., 29 (Mar. 9, 1994) (mandatory minimums are "imprudent, unwise and often an unjust mechanism for sentencing"); *Harris v. United States*, 536 U.S. 545, 570 (2002) (J. Breyer concurring) ("Mandatory minimum statutes are fundamentally inconsistent with Congress' simultaneous effort to create a fair, honest, and rational sentencing system...").

not agree to the bargains, the sentences actually imposed are often cruel and unusual.

III. THE COURT'S PRACTICE OF APPLYING A ROBUST PROPORTIONALITY REVIEW IN THE CAPITAL CONTEXT WHILE VIRTUALLY ELIMINATING PROPORTIONALITY REVIEW IN THE NONCAPITAL CONTEXT CANNOT BE JUSTIFIED.

The Court has recognized that "[t]he Eighth Amendment is not limited in application to capital punishment, but applies to all penalties." *McCleskey v. Kemp*, 481 U.S. 279, 315 (1987). Nonetheless, the Court has applied the Eighth Amendment very differently in the capital and noncapital contexts. In the capital context, the Court's proportionality review is robust: unlike in the noncapital context, the Court has not dismissed challenges to capital sentences merely because a sentence would promote a penological goal.[84] This robust review of capital sentences has led the Court to exempt certain offenses and certain offenders from the death penalty.[85] Although the same exemptions might

---

[84] *See, e.g., Coker v. Georgia*, 433 U.S. 584, 592 (1977). Of course, the death penalty always serves the goal of incapacitation, which the Court has pointed to as a penological goal justifying harsh noncapital sentences. *Ewing v. California*, 538 U.S. 11, 25 (2003).

[85] *Coker v. Georgia*, 433 U.S. 584, 592 (1977); *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650-51 (2008); *Enmund v. Florida*, 458 U.S. 782, 797 (1982); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Ford v. Wainwright*, 477 U.S. 399 (1986).

not necessarily apply to long prison sentences, applying such a cursory and deferential proportionality review in noncapital cases while applying a robust proportionality review in capital cases cannot be squared with Eighth Amendment.

The Eighth Amendment does not distinguish between capital and noncapital punishments; it prohibits all "cruel and unusual punishments." It is therefore not surprising that the Court has not attempted to justify treating capital cases differently based on the text of the Eighth Amendment. Rather, the Court has relied on a variety of functional arguments to justify its divergent application of the Eighth Amendment. These arguments do not provide an adequate justification for affording capital defendants substantive Eighth Amendment protections while denying those protections to noncapital defendants.

A. Neither the Text of the Eighth Amendment nor the Differences Between Death and Other Forms of Punishment Justify the Court's Divergent Application of the Proportionality Principle in Capital and Noncapital Cases.

In establishing a robust proportionality review for capital cases, the Court has repeatedly distinguished the death penalty from other forms of punishment. The most thorough explanation of the Court's special concern with capital cases is provided by Justice Brennan's concurring opinion in *Furman v. Georgia*, 408 U.S. at 286. However, none of the differences emphasized by Justice Brennan justify the Court's refusal to apply a robust proportionality review in noncapital cases.

Rather, these points demonstrate that Eighth Amendment oversight is necessary for both capital cases and terms of incarceration.

In *Furman*, Justice Brennan highlighted the difference in the pain associated with capital punishment and other punishments. He stated that death is "the only punishment that may involve the conscious infliction of physical pain." *Furman*, 408 U.S. at 287-88. Imposition of the death penalty certainly involves inflicting physical pain. However, imprisonment is typically also accompanied by a form of physical pain.[86] Prisoners regularly face violence while incarcerated.[87] In fact, it has been estimated that 70 percent of all inmates are assaulted by other inmates every year.[88]

In addition to the physical pain associated with capital punishment, Justice Brennan pointed to the "psychological torture" that accompanies the wait between the imposition of a death sentence and the infliction of death. *Furman*, 408 U.S. at 288. Again, there is no denying the extreme psychological pain associated with the death penalty. However, noncapital sentences are also accompanied by severe psychological trauma.[89]

---

[86] *See e.g.*, Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 116-38 (2007).

[87] *Id.* at 123-27; HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS 29-30, 42-43 (2001).

[88] *Racial Conflict*, *in* ENCYCLOPEDIA OF AMERICAN PRISONS 379 (Marilyn D. McShane & Frank P. Williams III eds., 1996).

[89] *See e.g.*, Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1168-70 (2009).

A sentence of life without parole is particularly traumatic. John Stuart Mill described those subject to a life sentence as being in "a living tomb, there to linger out what may be a long life . . . without any of its alleviation or rewards—debarred from all pleasant sights and sounds, and cut off from all earthly hope."[90] It is therefore not surprising that some individuals facing death sentences have waived their appeals, preferring death to a life sentence without parole.[91] Physical and mental pain are, therefore, hardly distinguishing characteristics of capital cases. They are emblematic of long terms of incarceration as well.

Justice Brennan also commented on the "awesome" nature of death, which "involves, by its very nature, a denial of the executed person's humanity." *Furman*, 408 U.S. at 290. He suggested that because of the degrading nature and enormity of the death penalty, it was more important to recognize robust Eighth Amendment rights in capital cases. However, the fact that Eighth Amendment protections are essential in the capital context does not mean that they should be nonexistent in the noncapital context. The right to a *Miranda* warning might be "far more important" for those facing capital charges than those suspected of a crime with a one-year punishment, yet everyone taken into police custody has the right to the same warning.

---

[90] John Stuart Mill, *Parliamentary Debate on Capital Punishment Within Prisons Bill* (Apr. 21 1868), *reprinted in* PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 271 (Gertrude Ezorksy ed. 1972).

[91] Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 712 n.143 (1998).

Finally, Justice Brennan pointed to the "finality" of the death penalty to distinguish it from other penalties. *Furman*, 408 U.S. at 289-90. However, once a prison sentence has been served, it is no more reversible than a death sentence. It is true that with a prison sentence what is irreversibly lost is a portion of one's life rather than one's entire life, but this is a distinction based on severity, not finality.

In sum, the fact that death may be a more severe punishment does not lead to the conclusion that Eighth Amendment protections are unwarranted in noncapital cases. The severity of death may mean that it applies to fewer categories of cases and offenders, but it does not speak to the level of constitutional protection that defendants facing noncapital punishments deserve. The Eighth Amendment does speak to that issue – and it makes no distinction between capital and noncapital cases.

B. The Purported Difficulties in Administering a Proportionality Review for Noncapital Sentences Are Present in Many Other Areas of the Law in which the Court Routinely Applies Some Form of Proportionality Review.

The Court has often alluded to the potential administrative problems associated with extending a robust proportionality review to noncapital cases.[92]

---

[92] *See e.g.*, *Ewing v. California*, 538 U.S. 11, 32 (2003) (Scalia, J. concurring); *Harmelin v. Michigan*, 501 U.S. 957, 1001 (Kennedy, J. concurring).

These concerns are highlighted in *Harmelin v. Michigan*, 501 U.S. 957 (1991). A portion of the opinion supported only by Justice Scalia and Chief Justice Rehnquist describes the three-part test for determining proportionality proposed in *Solem* and explains why two of the factors cannot be easily applied.[93] The first of these factors is the inherent gravity of the crime. This factor is purportedly problematic because the gravity of an offense "depends entirely upon how odious and socially threatening one believes [it] to be." *Id.* at 988. The second factor is the comparison of sentences imposed on other offenders in the same jurisdiction. This factor, according to this part of the opinion, raises the same problem. "One cannot compare the sentences . . . if there is no objective standard of gravity." *Id.* The opinion goes on to suggest that even if there were an objective standard of gravity, comparing the sentences for these offenses would do little to shed light on the proportionality of a given sentence. *Id.* at 989. According to the opinion, "[p]roportionality is an inherently retributive concept" addressing the question of whether punishment is commensurate with the harm imposed by the offender." *Id.* However, because the other goals of punishment, such as deterrence and rehabilitation, can affect sentence length, comparing sentences might reveal relatively little about how much retribution is appropriate for a given crime. *Id.*

This line of argument is directly contradicted by the fact that the Court applies proportionality tests in other areas that raise the very issues discussed in *Harmelin*.

---

[93] *Harmelin*, 501 U.S. at 985-94 (opinion of Scalia, J., joined by Rehnquist, C.J.).

As already noted, the Court has approved a proportionality test under the Eighth Amendment for punishments imposing death. Of course, "gravity" is no more objective in capital cases than in noncapital cases. Yet, in applying the proportionality principle in the capital context, the Court examines the gravity of the crime.[94] The Court also compares sentences imposed on other criminals in the same jurisdiction.[95] Thus, the Court finds value in such comparisons even where the relevant punishments may be furthering goals other than retribution. It is true that all crimes cannot be precisely ordered in terms of gravity and that penological goals other than retribution may affect prison sentences. However, this does not mean that when a jurisdiction imposes the same sentence for crimes that diverge widely in terms of gravity, such as shoplifting and rape, it sheds no light on the question of proportionality. It is not a purely objective inquiry to determine that death is a disproportionate punishment for rape or that death is a disproportionate punishment for a murder committed by a seventeen-year-old but not by an eighteen-year-old. These decisions necessarily involve some subjective judgment. However, they are based on evidence concerning society's sense of justice and broadly accepted principles concerning gravity, such as the principle that death is graver than other physical harms and the principle that juveniles are less culpable than adults.

---

[94] *See e.g., id.* at 598; *Thompson v. Oklahoma*, 487 U. S. 815, 835 (1988); *Enmund v. Florida*, 458 U.S. 782, 797 (1982).

[95] *See e.g., Enmund*, 458 U.S. at 795.

The Court has also applied proportionality review in cases involving fines. According to the Court, "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). Gravity is no less subjective when the potential penalty is a fine instead of a prison sentence. Nonetheless, in *Bajakajian*, the Court held that gravity can be measured by harm and culpability and that the punishment was disproportionate for a "crime [that] was solely a reporting offense," involving no physical or monetary harm. *Id.* at 339. If the Court can apply these standards in cases involving fines and in cases involving capital punishment, there is no reason why it cannot do so in cases involving prison sentences. In fact, the Court has stated that "[i]t would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not." *Solem v. Helm*, 463 U.S. 277, 289 (1983). However, this is the effect of the Court's current interpretation of the Eighth Amendment, and it is in direct contradiction to the text of the Eighth Amendment.

Moreover, the Eighth Amendment is not the only area in which the Court applies a proportionality principle. For example, the Court has imposed proportionality limits on punitive damages under the Fourteenth Amendment. *See e.g.*, *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). As in the Eighth Amendment context, the Court examines the

gravity of the offense in terms of the harm caused and the blameworthiness of the defendant, and it compares the penalty at issue with penalties authorized or imposed in similar cases. *See id.* at 574-75. "Gravity" is no less subjective when the punishment involves a loss of money in a civil matter instead of a loss of liberty in a criminal case. Furthermore, as the Court has repeatedly recognized, punitive damages serve both retributive and deterrent purposes.[96] Thus, any problems this might cause in comparing penalties in the criminal sentencing context are also present in the punitive damages context. Yet the Court strengthened proportionality review with regard to punitive damages in *Cooper Industries, Inc. v Leatherman Tool Group* by applying de novo review. 532 U.S. 424, 436 (2001).

The Court also applies various forms of proportionality in other areas that, while perhaps less analogous to prison sentences, also do not lend themselves to an objective, straightforward application of proportionality. The Court recognized this fact in *Solem*, when it stated that it may be difficult to decide that a 25-year sentence violates the Eighth Amendment where a 15-year sentence would not but "[t]he courts are constantly called upon to draw similar lines in a variety of contexts." *Solem*, 463 U.S. at 294. As an example, the Court pointed to the task of determining whether or not a defendant's Sixth Amendment right to a speedy trial has been violated, *id.*, a right the Court has characterized as "amorphous" and "slippery."

---

[96] *See e.g., Pacific Life Ins. Co. v. Haslip*, 499 U.S. 1, 19, 21 (1991); *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

Barker v. Wingo, 407 U.S. 514, 522 (1972). To determine if this right has been violated, the Court adopted a balancing test, which weighs the conduct of the government and the prejudice to the defendant against the conduct of the defendant. *Id.* at 530-34. Similarly, in the Fourth Amendment context, the Court routinely weighs the strength of the government interest in a search or seizure against the gravity of the intrusion into the person's privacy, liberty and property rights in situations where probable cause is absent. *See e.g.*, *Vernonia School District v. Acton*, 515 U.S. 646, 653-65 (1995); *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 619-33 (1989). It does so despite the recognition that "standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application," *Ker v. State of Cal.*, 374 U.S. 23, 33 (1963), and "[a]rticulating precisely what . . . 'probable cause' mean[s] is not possible." *Ornelas v. United States*, 517 U.S. 690, 695-96 (1996). As these examples illustrate, judges are often required to apply a substantial degree of subjective judgment to a particular set of facts to determine whether an individual's constitutional rights have been violated. The task may not always be easy, but judges are not free to ignore the Constitution's dictates simply because following its commands is difficult.

In any event, these analogous areas demonstrate that conducting proportionality review is a manageable task. There is no reason to believe that judges cannot bring the same skills they apply in these contexts to conducting proportionality review in the case of criminal sentences. In fact, lower courts have had little trouble imposing a proportionality review in the sentencing

context. After *Solem* was decided, courts had "little difficulty applying the [three-part] analysis to a given sentence." *Harmelin v. Michigan*, 501 U.S. 957, 1015 (White, J. dissenting). Many state courts also apply a serious proportionality review in noncapital cases.[97]

If applying a proportionality principle to prison sentences is squarely within a judge's skill set, the only other potential administrability problem is the quantity of cases that could raise these issues. However, as the Court recently held in *Melendez-Diaz v. Massachusetts*, the requirements of the Constitution cannot be relaxed merely to make the prosecution of criminals less burdensome.[98] And application of a proportionality principle in a large number of cases will not overburden the courts. Courts do not appear to be overwhelmed by the task of determining whether sentences that depart from the federal Sentencing Guidelines are "reasonable" under *United States v. Booker*, 543 U.S. 220, 262-63 (2005). Furthermore, the burden of proportionality review can be reduced by instituting certain categorical rules – for example, that a sentence of life without parole is unconstitutionally disproportionate for a juvenile who did not take the life of another.

---

[97] *See e.g.*, Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1184 (2009); *State v. Burgess*, 475 So.2d 35, 36-40 (La. Ct. App. 1985); *People v. Miller*, 781 N.E.2d 300, 307-08 (Ill. 2002); *State v. Davis*, 427 S.E.2d 754, 756 (W. Va. 1993); *State v. Bonner*, 577 N.W.2d 575, 581-82 (S.D. 1998); *People v. Lorentzen*, 194 N.W.2d 827, 831-33 (Mich. 1972).

[98] 129 S.Ct. 2527, 2009 LEXIS 4734 at *34 (2009).

CONCLUSION

For the foregoing reasons, the Court should hold the sentence imposed in the present case is unconstitutionally excessive.

Respectfully submitted,

RICHARD K. WILLARD
Counsel of Record
CHRISTOPHER G. FALCONE
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-3000

Of Counsel:
ANTHONY S. BARKOW
CENTER ON THE ADMINISTRATION
OF CRIMINAL LAW
110 West Third Street
New York, NY 10012
(212) 998-6612

Attorneys for Amicus Curiae

AMICUS CURIAE BRIEF

Nos. 08-7412 and 08-7621

Supreme Court, U.S.
FILED
JUL 23 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

—v.—

FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

—v.—

FLORIDA,

Respondent.

ON WRITS OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT, STATE OF FLORIDA

BRIEF OF COUNCIL OF JUVENILE CORRECTIONAL ADMINISTRATORS, NATIONAL ASSOCIATION FOR JUVENILE CORRECTIONAL AGENCIES, NATIONAL JUVENILE DETENTION ASSOCIATION, NATIONAL PARTNERSHIP FOR JUVENILE SERVICES, AMERICAN PROBATION AND PAROLE ASSOCIATION, AND INTERNATIONAL COMMUNITY CORRECTIONS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

CORRINE A. IRISH
Counsel of Record
GEORGE H. KENDALL
HOLLAND & KNIGHT LLP
195 Broadway, 24th Floor
New York, New York 10007
(212) 513-3200

Counsel for the Amici Curiae

July 23, 2009

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

LIFE WITHOUT PAROLE SENTENCING FAILS TO RECOGNIZE THAT, UNLIKE MANY ADULT OFFENDERS, JUVENILE OFFENDERS POSSESS UNIQUE POTENTIAL FOR REHABILITATION 4

1. Juvenile offenders are a distinct offender category because they possess broad potential for change and rehabilitation 4

   a. The needs and characteristics which so define this population also identify the unique opportunity to repair and transform juvenile offenders 9

2. Juvenile and adult corrections can rehabilitate these offenders and protect the community 16

   i. Model programs within juvenile corrections 18

      1. The Missouri Department of Youth Services 21

      2. The Texas Youth Commission 23

3. The appropriateness of a life sentence imposed on a juvenile offender can

properly be measured only by a post-sentencing review of his or her development 28

CONCLUSION 33

TABLE OF AUTHORITIES

Cases

Roper v. Simmons,
543 U.S. 551 (2005).....9

Other Authorities

About Missouri Youth Services Institute: Where We Are Working, http://mysiconsulting.org/about.php.....26

Francisco "Frank" J. Alarcon, Commentary, *Juvenile Corrections: Why Would Anyone Want to Work in This Business?*, CORRECTIONS TODAY (Amer. Correctional Assoc., Alexandria, Va), Feb. 2004, at 8.....16

American Corrections Association, *Professional Certification, Standards and Accreditation*, http://www.aca.org/.....4

American Corrections Association, Public Correctional Policy on Juvenile Justice Policy, (adopted Aug. 23, 1984, last amended Jan. 24. 2007), *available at* http://www.aca.org/government/policyresolution/view.asp?ID=25&origin=results&QS='Policies AndResolutionsYMGHFREType=Policy& reversesearch=false&viewby=50&union=

AND&startrec=1&top_parent=360.....4

American Corrections Association, Public Correctional Policy on Youthful Offenders Transferred to Adult Criminal Jurisdiction, (adopted Jan. 20, 1999; amended Jan. 14, 2004), *available at* http://www.aca.org/government/policyresolution/view.asp?ID=51&origin=results&QS='Policies AndResolutionsYMGHFREType=Policy&reversesearch=false&viewby=50&union=AND&startrec=1&pg_360=2&top_parent=360.....5, 18

American Jail Association: *About AJA*, http://www.aja.org/aja/about/index.shtml.....5

American Jail Association, Resolution: Juveniles in Jails (adopted May 22, 1990, re-affirmed May 3, 2008), http://www.aja.org/aja/about/resolutions.shtml#JUVENILES_IN_JAILS.....5

American Probation and Parole Association, Position Statement – Juvenile Justice (enacted Jan. 1996), http://www.appa-net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IB_PositionStatement&wps_key=85432f61-443f-451a-bc59-29a37574f94e.....7

Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992).....30

Association of State Correctional Administrators Resolutions, Resolution #2 – Evaluating the Effects of Incarceration in Adult Facilities on Youthful Offenders (adopted Aug. 10, 1997; amended Sept. 22, 2006), http://www.asca.net/documents/Youthful.pdf.....6

Shay Bilchik, *Challenging the Myths*, 1999 National Report Series, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice and Delinquency Prevention, Wash. D.C.), Feb. 2000.....32

Brief for the American Psychological Ass'n, & Missouri Psychological Ass'n as *Amici Curiae* Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005).....31

Bureau of Justice Statistics, State Court Sentencing of Convicted Felons, 2004- Statistical Tables – Table 1.3 Mean and Median Felony Sentence Lengths in State Courts, by Offense and Type of Sentence, 2004, *available at* http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04103tab.htm.....27-28

B.J. Casey et al., Structural and Functional Brain Development and Its Relation to Cognitive Development 54 BIOLOGICAL PSYCHOL. 241 (2000).....8

Elizabeth Cauffman & Lawrence Steinberg, *(Im)Maturity of Judgment in Adolescences: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741 (2000).....17

Henry R. Cellini, *Child Abuse, Neglect and Delinquency: The Neurological Link*, 55 JUV. & FAM. CT. J., Fall 2004, at 1.....13

Council of Juvenile Correctional Administrators, Position Paper on Waiver and Transfer of Youth to Adult Systems, *available at* http://cjca.net/photos/content/documents/Waiver.pdf.....18

Josh Day et. al., Structure and Function of the Adolescent Brain: Findings from Neuroimaging Studies, 175 ADOLESCENT PSYCHIATRY, Jan. 1, 2005.....8

Department of Youth Rehabilitation Services Opens State of the Art Facility for District Youth, Press Release, May 30, 2009, http://newsroom.dc.gov/show.aspx/agency/dyrs/section/2/release/17227.....26, 27

DYRS: Secure Program, http://dyrs.dc.gov/dyrs/cwp/view,a,3,q,599546.asp.....26

DYS Frequently Asked Questions: Treatment Services, http://www.dss.mo.gov/dys/faq/treatserv.htm....22

Jeffrey Fagan & Martin Guggenheim, *Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment*, 86 J. OF CRIM. L. & CRIMINOLOGY, 415, (1996.....31

Michael G. Flaherty, *The National Incidence of Juvenile Suicide in Adult Jails and Juvenile Detention Centers*, 13 SUICIDE AND LIFE THREATENING BEHAVIOR, (1983).....28

Julian Ford, et al., National Center for Mental Health and Juvenile Justice, *Trauma Among Youth in the Juvenile Justice System: Critical Issues and New Directions*, June 2007.....11,12,13

Martin Forst, Jeffrey Fagan & T. Scott Vivona, *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment Custody Dichotomy*, 40 JUV. & FAM. CT. J., 1989, at 1.....28

Jay N. Giedd et al., Brain Development During Childhood and Adolescence: A Logitudinal MRI Study,2 NATURE NEUROSCIENCE 861(1999).....8

James A. Gondles, Jr., Editorial, Kids are Kids, Not Adults CORRECTIONS TODAY (Amer. Corrections Assoc., Alexandria, Va), Feb. 2004.....8

Angela R. Gover, *The Effects of Child Maltreatment on Violent Offending Among Institutionalized Youth*, 17 VIOLENCE AND VICTIMS (2002).....14

Sarah Hammond, National Conference of State Legislatures, *Mental Health Needs of Juvenile Offenders*, (2007).....13,14

J. David Hawkins et al., A Review of Predictors of Youth Violence in SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS FOR SUCCESSFUL INTERVENTIONS (Loeber & Farrington, eds. 1998).....9

John Hubner, LAST CHANCE IN TEXAS (2005)...24

Timothy Hughes & Doris James Wilson, Bureau of Justice Statistics, Reentry Trends in the United States: Inmate Returning to the Community After Serving Time in Prison, http://www.ojp.usdoj.gov/bjs/reentry/reentry.htm.....27

ICCA Public Policy on Juvenile Justice (Jan. 29, 2006), *available at* http://www.iccaweb.org/public.html.....6

Katherine Kitzmann et al., *Child Witnesses to Domestic Violence: A Meta-Analytic Review*, 71 J. OF CONSULTING AND CLINICAL PSYCH., (2003).....11

R.K. Lenroot & J.N. Giedd, *Brain Development In Children And Adolescents: Insights From Anatomical Magnetic Resonance Imaging*, 30 NEUROSCI. & BEHAV. REVS. (2006).....17

Mark W. Lipsey & David B. Wilson, *Effective Intervention for Serious Juvenile Offenders: A Synthesis of Research*, in SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS FOR SUCCESSFUL INTERVENTIONS 19

Mark W. Lipsey, David B. Wilson, & Lynn Cothern, *Effective Intervention for Serious Offenders*, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice and Delinquency Prevention, Wash., DC), April 2000.....20

Edward J. Loughran & Kim Godfrey, CJCA YEARBOOK 2007: A NATIONAL PERSPECTIVE OF JUVENILE CORRECTIONS, (Council of Juvenile Correctional Administrators) (2008).....17,19

Missouri Division of Youth Services, *Dual Jurisdiction Program: A Sentencing Option for Youthful Offenders*, at 2, *available at* http://www.dss.mo.gov/dys/pdf/djp021705.pdf.....21

Missouri Division of Youth Services: Research & Evaluation, *Annual Report: Fiscal Year 2008* (2009).....21,23

Missouri Youth Services Institute: Home, http://mysiconsulting.org/index.php.....26

Solomon Moore, *Missouri System Treats Juvenile Offenders with Lighter Hand*, N.Y. TIMES, March 27, 2009, available at http://www.nytimes.com/2009/03/27/us/27juvenile.html?pagewanted=1&_r=1.....22

Norval Morris & Marc Miller, *Predictions of Dangerousness*, 6 CRIME & JUST. 1 (1985).....31

Stacey Nofziger & Don Kurtz, *Violent Lives: A Lifestyle Model Linking Exposure to Violence to Juvenile Violent Offending*, 42 J. OF RESEARCH IN CRIME AND DELINQUENCY (2005).....11

Offenders Under 18 in State Adult Correctional Systems: A National Picture, SPECIAL ISSUES

IN CORRECTIONS, (LIS, Inc., Longmont, Co.), Feb. 1995.....29

Office of Juvenile Justice and Delinquency Prevention, *Critical Findings: Serious and Violent Juvenile Offenders*, http://ojjdp.ncjrs.org/pubs/makingadiffer/critical_1.html.....20

Pennsylvania's Young Adult Offenders - Message from Superintendent Johnson, CORRECTIONAL NEWSFRONT (Pa. Dept. of Corrections, Pa.), 2001, Vol. XXVII.....15

Pennsylvania's Young Adult Offenders - Treatment Staff Stories and Experiences, CORRECTIONAL NEWSFRONT (Pa. Dept. of Corrections, Pa.), 2001, Vol. XXVII.....12

Frank W. Putnam, *The Impact of Trauma on Child Development*, 57 Juv. & Fam. Ct. J., Winter 2006, at 1.....13

Charles Puzzanchera, *Juvenile Arrests 2007*, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), April 2009.....32

Marcy Rasmussen Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. OF CRIM. L. & CRIMINOLOGY 449 (1996).....30

Brian A. Reaves, *Violent Felons in Large Urban Counties*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (BJS, Wash, D.C.),

July 2006.....28

Rhode Island Dept of Children, Youth and Families, *Proposal to Implement a New Treatment and Resocialization System for Adjudicated Youth in Rhode Island*, http://www.dcyf.state.ri.us/docs/rits_resocial.pdf.....27

Cary Rudman et. al, *Violent Youth in Adult Court: Process and Punishment*, 2 CRIME & DELINQUENCY 75 (1986).....30

Serious and Violent Juvenile Offenders, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice and Delinquency Prevention, Wash. D.C.), May 1998.....20

Jennifer N. Shaffer & R. Barry Ruback, *Violent Victimization as a Risk Factor for Violent Offending Among Juveniles*, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), December 2002.....10, 11

Melissa Sickmund, *Delinquency Cases in Juvenile Court, 2005*, OJJDP FACT SHEET, (Office of Juvenile Justice and Delinquency Prevention, Wash. D.C.), June 2009.....29

Melissa Sickmund, T.J. Sladky, and Wei Kang, Census of Juveniles in Residential Placement Databook (2008), http://www.ojjdp.ncjrs.gov/ojstatbb/cjrp/asp/state_offense.asp.....18,19

Howard N. Snyder, *Juvenile Arrests 2005*,

JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), April 2009.....30

Howard N. Snyder & Melissa Sickmund, *Juvenile Offenders and Victims: 2006 National Report*, OJJDP NATIONAL REPORT (Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), 2006.....14

Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859 (1999).....8

Patrick H. Tolan & Deborah Gorman-Smith, *Development of Serious and Violent Offending Careers*, in SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS (Rolf Loeber and David Farrington, eds. 1998).....30,31

Patricia Torbet et al, *State Responses to Serious and Violent Juvenile Crime*, OJJDP RESEARCH REPORT (Office of Juvenile Justice and Delinquency Prevention, Wash. D.C.), July 1996.....7

John A. Tuell, Child Welfare League of America, *Building Bridges to Better Outcomes for Children: The Link Between Juvenile Justice and Child Welfare*, at 1 (final draft), *available at* http://www.cwla.org/programs/juvenilejustice/flwhitepaper.pdf... 10

Texas Youth Commission: Research and Planning Department, *Review of Agency Treatment Effectiveness: Fiscal Year* 2008 (2008).....23-26

Texas Youth Commission, *Specialized Correctional Treatment*, http://www.tyc.state.tx.us/programs/special_treat.html.....25

Welcome to Performance-based Standards, http://pbstandards.org/ (2009).....18

Richard Wiebush, Raelene Freitag, & Christopher Baird, Preventing Delinquency through Improved Child Protection Services, JUVENILE JUSTICE BULLETIN, (Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), July 2001 9,10

Janet Wiig & Cathy Spatz Widom with John A. Tuell, *Understanding Child Maltreatment & Juvenile Delinquency: From Research to Effective Program, Practice, and Systemic Solutions*, CWLA PRESS (2003).....9

Shelley Zavlek, *Planning Community-Based Facilities for Violent Juvenile Offenders as Part of a System of Graduated Sanctions*, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice and Delinquency Prevention, Wash., DC), August 2005.....19,21,23

INTEREST OF *AMICI*[1]

We are Corrections professionals, working within and outside the prison system as corrections officers, probation/parole officers, community corrections workers and prison administrators with juvenile and adult offenders. It is our responsibility to protect society, maintain order within our facilities, and to be responsive to the needs of those committed to our care and supervision.

The **Council of Juvenile Correctional Administrators (CJCA)** represents the youth correctional CEOs in fifty states, Puerto Rico, Washington, D.C. and some major metropolitan counties. Through the collaborative efforts of its members, CJCA has developed an expertise in designing and implementing the most effective practices for the treatment of juveniles within their care.

The **National Association of Juvenile Correction Agencies (NAJCA)** was founded in 1903 and is an affiliate of the American Corrections Association. Its members represent the broad spectrum of researchers, administrators and caretakers working in the juvenile corrections field.

---

[1] The parties have consented to the filing of this brief and their consent letters have been filed with the clerk. No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

The **National Juvenile Detention Association (NJDA)** is an national organization with over 400 individual members consisting of juvenile detention practitioners and administrators as well as 12 affiliate state juvenile detention associations. Since 1968, the NJDA has existed exclusively to advance the science and processes of juvenile detention services.

The **National Partnership of Juvenile Services** was formed in 2001 and is the operating structure of five distinct organizations including *amici* NAJCA and NJDA, as well as the Juvenile Justice Trainers Association, the Council of Educators for At-Risk and Delinquent Youth and the National Association of Children of Incarcerated Parents.

The **American Probation and Parole Association (APPA)** is an international organization, which represents approximately 35,000 probations and parole practitioners within juvenile and adult corrections, including line staff, supervisors and administrators. The APPA seeks to develop a system of probation and parole services that provides public safety by ensuring humane, effective and individualized sentences for offenders, and support and protection for victims.

The **International Community Corrections Association (ICCA)** represents more than 250 private agencies operating over 1500 residential and other community-based correction programs for children and adults; it also has over 1000 individual members. The ICCA member agencies offer a variety of services to the courts, Departments of Corrections, counties, cities and states throughout the United

States including drug treatment, counseling, supervision, and aftercare.

SUMMARY OF ARGUMENT

While we strongly believe that juveniles must be held accountable for their actions, condemning a juvenile to prison for the rest of his life at a point where his true character and potential cannot be accurately assessed is deeply troubling. In our professional capacities, we have experienced great successes with juveniles who others believed could not succeed. We believe the critical question for this Court is not "whether" but "when" – when is the proper and humane time to decide if a juvenile deserves to spend his life in prison. Empirical data, medical science and practical experience overwhelmingly shows that juvenile offenders are distinct from adult offenders and that these distinctions evince a unique potential for rehabilitation. We submit, therefore, that this determination can be made only in a post-adolescence review of the development and treatment progress of a juvenile offender.

ARGUMENT

LIFE WITHOUT PAROLE SENTENCING FAILS TO RECOGNIZE THAT, UNLIKE MANY ADULT OFFENDERS, JUVENILE OFFENDERS POSSESS UNIQUE POTENTIAL FOR REHABILITATION

1. JUVENILE OFFENDERS ARE A DISTINCT OFFENDER CATEGORY BECAUSE THEY POSSESS BROAD POTENTIAL FOR CHANGE AND REHABILITATION

Corrections professionals have long regarded juvenile offenders as a distinct offender category and recognize a responsibility to address the unique needs of these offenders. The American Corrections Association ("ACA") – the oldest and largest corrections association in the world[2] – recognizes that "[c]hildren and youths have distinct personal and developmental needs and must be kept separate from adult offenders."[3] The ACA has found that the developmental needs of juveniles "require highly specialized management and treatment by corrections professionals", irrespective of whether

---

[2] *See* American Corrections Association, *Professional Certification, Standards and Accreditation,* http://www.aca.org/ (last visited July 21, 2009). The ACA provides professional development to the corrections workforce and promulgates national standards for the accreditation of corrections systems. *See id.*

[3] American Corrections Association, Public Correctional Policy on Juvenile Justice Policy ("ACA Juvenile Justice Policy"), (adopted Aug. 23, 1984, last amended Jan. 24. 2007), *available at* http://www.aca.org/government/policyresolution/view.asp?ID=25&origin=results&QS='PoliciesAndResolutionsYMGHFREType=Policy&reversesearch=false&viewby=50&union=AND&startrec=1&top_parent=360 (last visited July 21, 2009).

juveniles are within the juvenile justice system or have been adjudicated as an adult and sentenced to prison.[4] To that end, the ACA has adopted a policy mandating separate housing and special programming for youth transferred to the adult criminal system.[5]

Similarly the American Jail Association ("AJA") – the only national association that exclusively focuses on the issues specific to the operation of local correctional facilities,[6]– resolved that the AJA "be opposed in concept to housing juveniles in any jail unless that facility is specifically designed for juvenile detention and staffed with specially trained personnel."[7]

---

[4] American Corrections Association, Public Correctional Policy on Youthful Offenders Transferred to Adult Criminal Jurisdiction ("ACA Youthful Offender Policy"), (adopted Jan. 20, 1999; amended Jan. 14, 2004), *available at* http://www.aca.org/government/policyresolution/view.asp?ID=51&origin=results&QS='PoliciesAndResolutionsYMGHFREType=Policy&reversesearch=false&viewby=50&union=AND&startrec=1&pg_360=2&top_parent=360 (last visited July 21, 2009).

[5] *See id.*

[6] *See* American Jail Association: *About AJA*, http://www.aja.org/aja/about/index.shtml (last visited July 21, 2009).

[7] American Jail Association, Resolution: Juveniles in Jails (adopted May 22, 1990, re-affirmed May 3, 2008), http://www.aja.org/aja/about/resolutions.shtml#JUVENILES_IN_JAILS. In adopting this position, the AJA relied in part on its determination that juveniles housed with adults may be victimized through homosexual rape and other violence, and that "the care and legal requirement of housing juveniles are not a part of an adult jail facility's responsibilities, and require specially trained staff and specially designed programming which are not readily available in an adult facility." *Id.*

The Association of State Correctional Administrators ("ASCA") - has also resolved, with regard to juveniles adjudicated as adults that:

> By virtue of their unique needs and legal circumstances, it is appropriates to qualify "juveniles," or youthful offenders, as a "special needs" population when they are admitted to adult corrections agencies, and to house and treat them accordingly.
>
> . . . .
>
> It is appropriate to provide special programs for these populations based on statutory requirements and individual needs assessments.[8]

The International Community Corrections Association ("ICCA") also regards children and youth as having "distinct personal and developmental needs that require specialized programs completely apart from adult offenders."[9]

The American Probation and Parole Association has similarly urged that juvenile justice both be responsive to the needs of a broad range of

---

[8] Association of State Correctional Administrators Resolutions, Resolution #2 – Evaluating the Effects of Incarceration in Adult Facilities on Youthful Offenders (adopted Aug. 10, 1997; amended Sept. 22, 2006), http://www.asca.net/documents/Youthful.pdf.

[9] ICCA Public Policy on Juvenile Justice (Jan. 29, 2006), *available at* http://www.iccaweb.org/public.html (last visited July 21, 2009).

children and youth – even the most violent offenders – and to protecting society.[10]

Across the spectrum, corrections professionals have concluded that juvenile offenders, even within the adult corrections system, are a population with needs and characteristics that cannot be addressed through a traditional penological methodology. This belief is at the core of the juvenile corrections system, and is now underlying the establishment of Young Offender Divisions within adult corrections systems in many states.[11]

As widely recognized within corrections, proper treatment of juveniles within the corrections system must recognize and address their developmental needs. Medical science confirms both the need for categorical distinctions in the treatment of juvenile vs. adult offenders and the importance of addressing the developmental needs of juvenile offenders within both adult and juvenile corrections. Studies conclusively establish that the brain of an adolescent is not fully developed, particularly in the area of the prefrontal cortex, which is critical to higher order cognitive functioning and impulse

---

[10] American Probation and Parole Association, Position Statement – Juvenile Justice (enacted Jan. 1996), http://www.appa-net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IB_PositionStatement&wps_key=85432f61-443f-451a-bc59-29a37574f94e.

[11] *See* Patricia Torbet et al, *State Responses to Serious and Violent Juvenile Crime*, OJJDP RESEARCH REPORT (Office of Juvenile Justice and Delinquency Prevention, Wash. D.C.), July 1996, at 25-34 (describing the attempts by some states to address the influx of juvenile offenders into the adult system through the establishment of Youthful Offender Divisions).

control.[12] When a juvenile is confined either to the juvenile or adult corrections system, regardless of sentence, the institution is responsible for addressing those neurobiological-based deficiencies by providing the tools for that juvenile's positive maturation into adulthood. It is therefore incongruous to impose a sentence that fails to acknowledge any such development.

> Kids today may be maturing physically earlier than before, but mentally they still require teaching, training, loving, skill-building, and learning through years of maturity. Bodies may be growing faster but no child is born with morals, with judgment, or with remorse; they learn these and other emotions and controls.

James A. Gondles, Jr. Executive Director, American Correctional Association[13]

---

[12] *See* Josh Day et al., *Structure and Function of the Adolescent Brain: Findings from Neuroimaging Studies*, 175 ADOLESCENT PSYCHIATRY, Jan. 1, 2005, at 1-34; B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOL. 241, 243 (2000); Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859, 860-61 (1999); Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Logitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861, 861 (1999).

[13] James A. Gondles, Jr., Editorial, *Kids are Kids, Not Adults*, CORRECTIONS TODAY (Amer. Corrections Assoc., Alexandria, Va), Feb. 2004, at 6.

a. The needs and characteristics which so define this population also identify the unique opportunity to repair and transform juvenile offenders

While this Court has recognized, and medical research has confirmed, the categorical immaturity and vulnerability ascribed to juveniles, *see Roper v. Simmons*, 543 U.S. 551, 569 (2005), in the juvenile offender population these developmental deficiencies coalesce with personal and environmental challenges that contribute to delinquent and criminal behavior.[14]

Corrections professionals working with the juvenile offender population encounter youth that are commonly simultaneously both victim and offender. A strong correlation between child maltreatment – abuse or neglect – and delinquent and criminal behavior in juveniles is well established.[15] Studies examining the prevalence of child maltreatment among juvenile offenders in various states reported results ranging from 29% to

---

[14] *See* J. David Hawkins et al., *A Review of Predictors of Youth Violence*, in SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS FOR SUCCESSFUL INTERVENTIONS 119-146 (Loeber & Farrington, eds. 1998) (discussing the influence of family, community and peer factors in violent offending).

[15] *See* Richard Wiebush, Raelene Freitag, & Christopher Baird, *Preventing Delinquency through Improved Child Protection Services*, JUVENILE JUSTICE BULLETIN, (Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), July 2001, at 1-3 (reviewing research establishing this link); Janet Wiig & Cathy Spatz Widom with John A. Tuell, *Understanding Child Maltreatment & Juvenile Delinquency: From Research to Effective Program, Practice, and Systemic Solutions*, CWLA PRESS, at 1-9 (2003) (same).

66% of offenders with reported or substantiated cases of child maltreatment.[16]

Juveniles who committed violent offenses are also more likely to have been victimized outside their home. The Office of Juvenile Justice and Delinquency Prevention reported a "strong link" between violent offending and violent victimization, with victimization defined as being shot or stabbed, threatened with a weapon or "jumped." Jennifer N. Shaffer & R. Barry Ruback, *Violent Victimization as a Risk Factor for Violent Offending Among Juveniles*, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), December 2002, at 3. According to this study, juveniles who were victimized in year 1 were 3 times more likely than nonvictims to offend in year 2 (52% versus 17%).[17] *Id.* at 4. Clinical and epidemiological

---

[16] Richard Wiebush et al. *supra* n. 15 at 2. In 2004, Florida ranked 1st in the country for substantiated victims of child maltreatment and 1st in the country for the number of African-American maltreated youth in out-of-home placements. John A. Tuell, Child Welfare League of America, *Building Bridges to Better Outcomes for Children: The Link Between Juvenile Justice and Child Welfare*, at 1 (final draft), *available at* http://www.cwla.org/programs/juvenilejustice/flwhitepaper.pdf (last visited July 21, 2009). The number of victims of child maltreatment in Florida that end up in the juvenile justice system is unknown, but a review by Florida's Office of Program Policy and Government Accountability of 90 case files of girls in juvenile justice residential programs found that 68% experienced physical or sexual abuse or neglect. *Id.* at 7.

[17] The study also reported that:

> Within year 1, juveniles who offended were 5.3 times more likely than nonoffenders to be victimized (37% versus 7%), and those who were victimized were 2.4 times more likely than nonvictims to offend (78% versus 32 percent).

studies indicate that at least three in four youth in the juvenile justice system have been exposed to severe victimization.[18] Vulnerability to victimization continues to be a significant issue for juvenile offenders while incarcerated. *See infra* n. 62.

Witnessing acts of violence alone is a substantial risk factor for juvenile violent offending.[19] Children who witness interparental domestic violence fare far worse than children with no exposure to this kind of violence, experiencing a range of emotional, behavioral, social and academic problems.[20]

> According to [State Correctional Institute] Houtzdale's Drug and Alcohol Treatment Specialist Heather Yasolsky,

---

> Within year 2, juveniles who offended were 6 times more likely than nonoffenders to be victimized (42% versus 7%), and those who were victimized were 4 times more likely than nonvicitms to offend (66% versus 16%).

Jennifer N. Shaffer & R. Barry Ruback, *supra*, at 2-3.

[18] Julian Ford, et al., National Center for Mental Health and Juvenile Justice, *Trauma Among Youth in the Juvenile Justice System: Critical Issues and New Directions*, June 2007, at 3.

[19] *See* Stacey Nofziger & Don Kurtz, *Violent Lives: A Lifestyle Model Linking Exposure to Violence to Juvenile Violent Offending*, 42 J. OF RESEARCH IN CRIME AND DELINQUENCY 3, 17-19 (2005) (finding that being a witness to violence increases the risk of offending by 769%).

[20] *See* Katherine Kitzmann et al., *Child Witnesses to Domestic Violence: A Meta-Analytic Review*, 71 J. OF CONSULTING AND CLINICAL PSYCH., 339, 344, 345 (2003) (performing a meta-analysis of 118 studies and finding that 63% of child witnesses to interparental domestic violence were faring poorly as compared to their peers with no exposure).

> [Young Adult Offenders'][21] favorite programs are COPS-type of television shows.
>
> "I find it interesting that they are always so concerned with scenes that involve kids," Yasolsky said. "They were really concerned when one reenactment showed a highly explosive chemical used to make methamphetamines sitting right next to children's toothbrushes."
>
> Yasolsky said YAOs are very protective of kids. She believes that they wish someone had protected them, thus avoiding their incarceration.

Pennsylvania's Young Adult Offenders - Treatment Staff Stories and Experiences, CORRECTIONAL NEWSFRONT (Pa. Dept. of Corrections, Pa.), 2001, Vol. XXVII, at 15.

The negative impact of trauma on the development of adolescents is plainly evident among the juvenile offender population.[22] "Traumatized adolescents typically do not lack a sense of self or values, but are often too anxious, angry, or confused to rely upon these psychological resources while struggling with a sense of being in constant danger."[23] Moreover trauma involving victimization by others is more likely than other forms "to lead to impairment in psychosocial functioning and physical

---

[21] Juveniles sentenced for committing adult crimes in Pennsylvania are designated Young Adult Offenders.

[22] *Cf.* Julian D. Ford et al., *supra* n. 18, at 1-3 (discussing the negative impact of trauma on development).

[23] *Id.* at 2.

health."[24] Trauma can, therefore, further exacerbate the neurobiological and psychological immaturity of youth and, as a result, impair an adolescent's already more limited cognitive processing and behavioral regulation.[25]

> When exposed to trauma or mistreatment, a youth may cope by resorting to indifference, defiance, or aggression as self-protective reactions. In these cases, risk-taking, breaking rules, fighting back, and hurting others who are perceived to be powerful or vulnerable may become a way to survive emotionally or literally.[26]

As a result, perhaps, of the twin effects of trauma and developmental deficiencies, corrections professionals see a significant number of juvenile offenders with mental health issues. As many as 70 percent of juvenile offenders are affected with a mental disorder – depression, anxiety, post-traumatic stress, conduct disorders – and one in five suffer from a mental illness that impairs their ability to function.[27] Two-thirds of juvenile offenders with

---

[24] *Id.*

[25] *See* Frank W. Putnam, *The Impact of Trauma on Child Development*, 57 Juv. & Fam. Ct. J., Winter 2006, at 1, 1-7 (discussing the neurological effects of child maltreatment on youth); Henry R. Cellini, *Child Abuse, Neglect and Delinquency: The Neurological Link*, 55 JUV. & FAM. CT. J., Fall 2004, at 1, 1-14 (discussing research showing the "clear connection" between child maltreatment and negative changes in a youth's neurological development).

[26] Julian D. Ford et al, *supra* n. 18, at 3.

[27] Sarah Hammond, National Conference of State Legislatures, *Mental Health Needs of Juvenile Offenders*, at 4 (2007); *see*

any mental health diagnosis most often had a dual diagnosis, typically substance abuse.[28]

In order to address the developmental needs of these offenders, corrections professions must first confront and repair the effects of trauma and victimization that have impaired normal development and socialization. While exposure to violence and victimization creates a significant risk for juvenile violent offending, the formation of positive social learning and social control factors – i.e. family and school attachments and other environmental factors that can serve to reject the propriety of violent behavior – mediates the risk of engaging in violent behavior.[29] As discussed *infra*, corrections professional have the ability to treat and reform these offenders.

Howard N. Snyder & Melissa Sickmund, *Juvenile Offenders and Victims: 2006 National Report*, OJJDP NATIONAL REPORT (Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), 2006, at 233. (reporting results of a survey designed to detect emotional problems showing that 90% of committed youth presented as having some type of emotional disorder; 71% more than one). 81% of committed youth surveyed indicated some degree of anger management problem; 61% also presented as experiencing anxiety and 59%, depression. Howard N. Snyder & Melissa Sickmund, *supra*, at 233. 27% of these youth reported suicidal feelings or ideation and 21% had attempted suicide at least once in their life. *Id.*

[28] Sarah Hammond, *supra* n. 27, at 5.

[29] *See* Angela R. Gover, *The Effects of Child Maltreatment on Violent Offending Among Institutionalized Youth*, 17 VIOLENCE AND VICTIMS 655, 657, 662 (2002) (discussing various studies and reporting that in a study of over 3000 juvenile offenders across the country, the increased likelihood of violent offending created by the effect of child maltreatment was mediated by social learning and social control factors).

> My philosophy in working with Young Adult Offenders (YAOs) is that if you keep them feeling safe, they will grow and develop and allow you to lead them. If for any reason that YAO feels that safety is jeopardized, he has a tendency to revert to behavior he knows from the streets and that often includes violence. The inmates who enter the Young Adult Offender Program often come into the facility in what we refer to as "survival mode." Until we can teach them that there is more to life than just survival, they test us as staff. One day you come to work, and the inmate who has been the biggest problem in the program has a new look about him. He is following the rules and being respectful, for the first time taking responsibility for himself. That is the day you know that you have been able to reach that inmate.

J. Barry Johnson, former Superintendent (2000-2007) SCI Pine Grove – a maximum-security correction facility for Young Adult Offenders in Pennsylvania.[30]

---

[30] *Pennsylvania's Young Adult Offenders - Message from Superintendent Johnson*, CORRECTIONAL NEWSFRONT (Pa. Dept. of Corrections, Pa.), 2001, Vol. XXVII, at 3.

2. JUVENILE AND ADULT CORRECTIONS CAN REHABILITATE THESE OFFENDERS AND PROTECT THE COMMUNITY.

> We know so much more today about "what works" than we knew 30, 20 and even 10 years ago. Evidence- and research-based approaches to reducing juvenile crime and improving recidivism rates are gaining in acceptance and implementation. We are getting better at targeting our prevention resources for high-risk children before they have serious involvement in the system. We are improving our screening and assessment tools to better understand both the strengths and weaknesses of the families and young people we see. We are doing a better job of training our work force to meet the challenges of juvenile crime in the new millennium.

Francisco "Frank" J. Alarcon, Deputy Secretary, Florida Department of Juvenile Justice[31]

Despite the widespread and inaccurate misconception that violent juvenile offenders are – as evidenced by the nature of the offenses they have committed – incapable of being rehabilitated, we see a remarkable amount of success with these offenders. The wealth of research now available on violent behavior in youth has provided corrections

---

[31] Francisco "Frank" J. Alarcon, Commentary, *Juvenile Corrections: Why Would Anyone Want to Work in This Business?*, CORRECTIONS TODAY (Amer. Correctional Assoc., Alexandria, Va), Feb. 2004, at 8.

administrators, staff and probations officers with the tools needed to implement effective rehabilitation efforts. In recent years, there has been an increase in the availability and use of evidence-based practices - practices that controlled research shows to have resulted in improved outcomes - in treating juvenile offenders.[32] Research indicating that aspects of the brain regulating cognitive and behavioral responses are undeveloped in adolescents[33] has guided corrections professionals toward effective cognitive and behavioral therapies. According to a 2007 survey, 88% of states utilize Cognitive-Behavioral Therapy in their juvenile facilities, 57% use Aggression Replacement Therapy, and many also use a number of other therapies – Functional Family Therapy, Multi-systemic Therapy, and Therapeutic Foster Care among others – designed to address the social and environmental stressors that contribute to delinquent and criminal behavior.[34]

---

[32] Edward J. Loughran & Kim Godfrey, CJCA YEARBOOK 2007: A NATIONAL PERSPECTIVE OF JUVENILE CORRECTIONS, (Council of Juvenile Correctional Administrators) ("CJCA YEARBOOK") 55 (2008).

[33] *See* R.K. Lenroot & J.N. Giedd, *Brain Development In Children And Adolescents: Insights From Anatomical Magnetic Resonance Imaging*, 30 NEUROSCI. & BEHAV. REVS. 718, 723 (2006) (discussing the neurobiological basis for adolescents' lesser ability as compared to adults, to self-regulate their behavior); Elizabeth Cauffman & Lawrence Steinberg, *(Im)Maturity of Judgment in Adolescences: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 756-57 (2000) (discussing cognitive and psychosocial immaturity in adolescents); *see also supra* n. 12.

[34] CJCA YEARBOOK, *supra* n. 32, at 55-56.

Performance-based Standards (PbS), a system launched by the Office of Juvenile Justice and Delinquency Prevention and directed by the Council for Juvenile Correctional Administrators ("CJCA"), now sets national standards establishing the highest quality practices and treatment services for incarcerated youth and monitors participating facilities by outcome measures that report on the safety, security, order and climate within facilities as well as education, health/mental health, programming and reintegration services. *Welcome to Performance-based Standards*, http://pbstandards.org/ (2009). For serious and violent juvenile offenders, juvenile and adult corrections embrace a model that balances accountability and security with the delivery of services – developmental, educational, mental health – that address the special needs of this population.[35]

i. Model programs within juvenile corrections

While some violent offenders are transferred into the adult system, the juvenile system also retains a significant number – either adjudicated delinquent or tried as an adult but serving all or part of their sentence in a juvenile facility. The 2006 Census of Juveniles in Residential Placement revealed that of the approximately 92,000 youth held in juvenile residential facilities, 23% committed violent crime index offenses (criminal homicide,

---

[35] *See* Council of Juvenile Correctional Administrators, Position Paper on Waiver and Transfer of Youth to Adult Systems, *available at* http://cjca.net/photos/content/documents/Waiver.pdf (last visited July 21, 2009); ACA Youthful Offender Policy, *supra* n. 4.

violent sexual assault, robbery, aggravated assault).[36] Melissa Sickmund, T.J. Sladky, and Wei Kang, Census of Juveniles in Residential Placement Databook (2008) ("CJRP Databook"), http://www.ojjdp.ncjrs.gov/ojstatbb/cjrp/asp/state_offense.asp. Further, 10% of all the juveniles in residential placement were placed there for a burglary offense. *Id.* Only 5% of all juveniles in these facilities were held for status offenses (running away, truancy, incorrigibility, underage drinking).[37] *Id.*

The experience of juvenile corrections in treating this population has led to improved outcomes[38] and models for success. More

---

[36] In 2006, juvenile facilities held 6792 juveniles committed for sexual assault, 6707 committed for robbery, 7289 committed for aggravated assault, and 988 committed for homicide. Melissa Sickmund, T.J. Sladky, and Wei Kang, Census of Juveniles in Residential Placement Databook (2008) ("CJRP Databook"), http://www.ojjdp.ncjrs.gov/ojstatbb/cjrp/asp/state_offense.asp. A 2007 survey by the CJCA including youth in residential and non-residential juvenile corrections services reported a population of more than 225,000 youth, 27% of whom committed violent crime index offenses. CJCA YEARBOOK 2007, *supra*, at 26.

[37] The remaining categories of juveniles confined include 15% committed for other property offenses (theft, arson, other), 11% committed for public order offenses (weapons, other), 9% committed for drug offenses, and 11% committed for simple assault or other person offenses. CJRP Databook, *supra* n. 36.

[38] Shelley Zavlek, *Planning Community-Based Facilities for Violent Juvenile Offenders as Part of a System of Graduated Sanctions*, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice and Delinquency Prevention, Wash., DC), August 2005, at 6; *see* Mark W. Lipsey & David B. Wilson, *Effective Intervention for Serious Juvenile Offenders: A Synthesis of Research*, in SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS FOR SUCCESSFUL INTERVENTIONS 338 (Loeber &

importantly, positive results are not difficult to replicate. The efficacy of rehabilitation programs do not vary based on the characteristics of the juvenile offenders treated (including the nature of the offenses committed and prior offense history).[39] Rather, program characteristics – the way a program is organized, staffed, administered – have been found to be the most important factor impacting program effectiveness; in particular, larger treatment effects were found for more well-established programs.[40] Treatment type and amount was next in significance – the longer the treatment, the greater the effectiveness.[41] The type of treatment shown most effective was interpersonal skills programs – those that focused on social skills training, anger management, moral education, etc.[42] Aftercare programs upon release that prepare juveniles for re-entry into the community, are also essential to

---

Farrington, eds. 1998) (conducting a meta-analysis of 200 studies of interventions with institutionalized and non-institutionalized youth and finding that treatment programs for serious and violent offenders have been shown reduce recidivism by as much as 40%).

[39] *See* Mark W. Lipsey, David B. Wilson, & Lynn Cothern, *Effective Intervention for Serious Offenders*, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice and Delinquency Prevention, Wash., DC), April 2000, at 3 (finding in a meta-analysis of 83 studies of programs for institutionalized serious violent and nonviolent offenders that offender characteristics had the smallest effect on outcomes).

[40] *Id.* at 3, 4.

[41] *Id.* at 3.

[42] *Id.* at 3-4; Office of Juvenile Justice and Delinquency Prevention, *Critical Findings: Serious and Violent Juvenile Offenders*, http://ojjdp.ncjrs.org/pubs/makingadiffer/critical_1.html (last visited July 21, 2009).

continued progress once juvenile offenders are released.[43]

1. The Missouri Department of Youth Services

Missouri's system has had extraordinary success reducing recidivism through a system of regional small-scale secure correction centers and an array of community-based non-residential programs and group homes.[44] In Missouri's Department of Youth Services ("MDYS") for 2008, 13% of the youth were committed for the most serious felonies (A&B felonies) and 41% for other felonies.[45] Missouri Division of Youth Services: Research & Evaluation, *Annual Report: Fiscal Year 2008* (*"MDYS 2008 Annual Report"*), at vi (2009). The Division of Youth Services receives juveniles tried as adults with blended sentences – juvenile and adult sentences imposed with the execution of the adult sentence suspended.[46] In 2008, 46% of youth admitted to MDYS had a history of prior mental health services, 54% had a history of prior substance abuse involvement, and 23% were identified as having an educational disability. *MDYS 2008 Annual Report*, *supra* at vi.

---

[43] *Serious and Violent Juvenile Offenders*, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice and Delinquency Prevention, Wash. D.C.), May 1998, at 6.

[44] Zavlek, *supra* n. 38 at 8.

[45] 37% were committed for misdemeanors and other non-felonies; 10% for juvenile (status) offenses. *MDYS 2008 Annual Report*, *supra*, at vi.

[46] Missouri Division of Youth Services, *Dual Jurisdiction Program: A Sentencing Option for Youthful Offenders*, at 2, *available at* http://www.dss.mo.gov/dys/pdf/djp021705.pdf (last visited July 21, 2009).

Three-fourths of offenders committed to MDYS are assigned to non-residential community programs and less secure facilities. Zavlek, *supra* n. 38 at 8. This allows the medium to high-security facilities to maintain a smaller population and provide individualized treatment for each youth. Treatment addresses issues including victim empathy, social skills, anger/emotions management, healthy thinking patterns and coping skills, peer influences, substance abuse, and self-esteem; much of the programming centers around group dynamics and processes.[47] Missouri's approach utilizes constant therapeutic interventions and minimal force.

> In a typical juvenile corrections environment, Mr. Decker [Director of MDYS] said, if a youth becomes aggressive "you would have guards drag him into isolation" for three days.
>
> "But," he added, "the problem is that a young person doesn't learn how to avoid that aggressive behavior and it will get worse."
>
> In Missouri Hills [one of the MDYS facilities], isolation rooms were used only about a dozen times last year, Mr. Decker said, and never for more than a few hours. Pepper spray is banned, and youth are taught to de-escalate fights or apply grappling holds, a form of restraint.

---

[47] *DYS Frequently Asked Questions: Treatment Services*, http://www.dss.mo.gov/dys/faq/treatserv.htm (last visited July 21, 2009).

> [One juvenile] explained how her housing unit does a "circle-up," or ad hoc counseling session, several times a day, whenever there is a conflict, like cursing.
>
> . . . .
>
> When someone becomes unruly, the other youth are trained to talk him down.[48]

MDYS's recidivism rate based on the recommitment to MDYS after 24 months of release was 10% for 2008 and had been between 7-9% for the 4 years prior to 2008. *MDYS 2008 Annual Report*, at 18. Moreover, as of 2005, only 7% of youth released from MDYS were in Missouri's prisons 5 years after their release. Zavlek, *supra* n. 38 at 30. Missouri's model is also cost-effective – MDYS's budget in 2000 amounted to about $94 per youth in Missouri's population, while the average budget in the eight states surrounding Missouri was approximately $140 per youth. *Id.*

2. The Texas Youth Commission

The Texas Youth Commission ("TYC"), although undergoing some changes in programming,[49] has had proven success treating

---

[48] Solomon Moore, *Missouri System Treats Juvenile Offenders with Lighter Hand*, N.Y. TIMES, March 27, 2009, available at http://www.nytimes.com/2009/03/27/us/27juvenile.html?pagewanted=1&_r=1 (last visited July 21, 2009).

[49] TYC is now in the process of implementing a new general treatment program CoNEXTions - that combines cognitive-behavioral based interventions, an aggressive skills and motivation component, an aggressive community integration and a strong academic or workforce development component.

youth convicted of serious violent offenses and sex offenses. TYC in 2008 had 83% of committed youth with an IQ less than 100, 58% had prior out of home placements, 33% had a history of abuse and neglect, 49% had a family history of criminal behavior, 36% was special education eligible and 32% had a serious mental health diagnosis. Texas Youth Commission: Research and Planning Department, *Review of Agency Treatment Effectiveness: Fiscal Year* 2008 ("*TYC Review 2008*"), at 3 (2008). TYC offered Resocialization as its primary treatment intervention, which focused on three major areas: academic and workforce development, behavior modification, and correctional therapy. *Id.* at 7.

The specialized treatment programs were based on the Resocialization model but with emphasis on the specific treatment need.[50] *Id.* at 7-8.

TYC Review 2008, *supra* at 16. The Specialized treatment programs are currently being updated to integrate practices from this treatment model. *Id.* at 7-8.

[50] In the general program, an offender progressed through a system of four "phases" in each area - Orientation, Life Story, Offense Cycle, and Success Plan - that required youth to learn and demonstrate competency in a series of objectives designed to reduce the probability of offending. *Id.* at 7. In the specialized program:

> Life Stories included additional focus on the etiology and development of those specific risk areas associated with the specialized need being addressed. Offense cycles were expanded to include understanding of how aggressive, sexual or drug related behavior patterns emerged and were maintained with emphasis on how they could be modified. Success Planning addressed specific risk management issues in the community to address these specialized risks. In addition, those in the specialized programs

The Capital and Serious Violent Offender Treatment Program, operated within the high-security Giddings State School, is an intensive 24-week program, where youth enroll after spending years in general population.[51] Through extended group therapy sessions "[t]he program helps these young people connect feelings associated with their violent behavior and to identify alternative ways to respond when faced with risky situations in the future. Participants in this program are required to reenact their crimes and to play the role of both perpetrator and victim." Texas Youth Commission, *Specialized Correctional Treatment*, http://www.tyc.state.tx.us/programs/special_treat.html (last visited July 21, 2009). The Sexual Behavior Treatment Program is a structured 12-18 month program operating at three TYC institutions. *TYC Review 2008*, *supra* at 8. The program builds on the agencies treatment program with individual and group counseling focusing on the youth deviant sexual behavior, includes psychosexual education and, for youth with abuse histories, trauma resolution therapies. Texas Youth Commission, *Specialized Correctional Treatment*, *supra*.

Both programs have been shown effective in reducing recidivism. Notably, in 2008, the re-arrest rate within 12 months for a violent offense was 3% for those in the sex offender program and 2% for the

---

received Psycho-educational programming to help them better understand "normal" development and social customs.

TYC Review 2008, *supra*, at 8.

[51] John Hubner, LAST CHANCE IN TEXAS xxiv(2005); *TYC Review 2008*, *supra*, at 8.

violent offender program. *TYC Review 2008* at 10-11. The treatment effectiveness of the programs were measured as compared to a control group (offenders with high risk for sexual or violent re-offense who did not participate in this program) and both showed large differences.[52] *Id.* at 5, 18. The violent offender program participants were 36% less likely to be arrested for any offense and 68% less likely to be arrested for a violent offense within 1 year; the sex offender program participants were 62% less likely to be rearrested for a violent offense within one year and 18% less likely to be incarcerated for any offense within three years. *Id.* at 10, 11.

Other states and jurisdictions have embraced these models. The District of Columbia, Santa Clara County (Ca.), San Francisco City and County (Ca.), New York, Louisiana and New Mexico are now working with the Missouri Youth Services Institute[53] to implement changes to their systems.[54] The District of Columbia has recently announced the

---

[52] The sex offender control group had a 5% rate of re-arrest and the violent offender control group had an 8% rate of re-arrest rate for violent offenses. While there was a statistically significant difference for the sex offender group, the difference between the capital offender group and the control group was not significant because of the small sample size. *Id.* at 18.

[53] The Missouri Youth Services Institute is a not-for-profit founded by Mark D. Steward, former Director of Missouri Youth Services to assist juvenile systems in their reform efforts. *Missouri Youth Services Institute: Home*, http://mysiconsulting.org/index.php (last visited July 21, 2009).

[54] *See About Missouri Youth Services Institute: Where We Are Working*, http://mysiconsulting.org/about.php (last visited July 21, 2009).

opening of a new secure facility for serious juvenile offenders – the "New Beginnings Youth Development Center" – that will adopt a nine-to-twelve month behavior modification program modeled after the Missouri approach for the most serious and chronic young offenders.[55] The D.C. Department of Youth Rehabilitation Services has reported a 50% decrease in recidivism among their youth in secure custody since 2005 through an increased focus on rehabilitation.[56] Rhode Island recently announced a proposal to implement the Resocialization System utilized by the TYC.[57]

Though information-sharing and the implementation of research-based practices, the rehabilitation of violent juvenile offenders is not a theoretical possibility, it is a practical reality.

---

[55] *DYRS: Secure Program*, http://dyrs.dc.gov/dyrs/cwp/view,a,3,q,599546.asp (last visited July 21, 2009). *Department of Youth Rehabilitation Services Opens State of the Art Facility for District Youth*, Press Release, May 30, 2009, http://newsroom.dc.gov/show.aspx/agency/dyrs/section/2/release/17227.

[56] *Department of Youth Rehabilitation Services Opens State of the Art Facility for District Youth, supra.*

[57] *See generally* Rhode Island Dept of Children, Youth and Families, *Proposal to Implement a New Treatment and Resocialization System for Adjudicated Youth in Rhode Island*, http://www.dcyf.state.ri.us/docs/rits_resocial.pdf (last visited July 21, 2009).

3. THE APPROPRIATENESS OF A LIFE SENTENCE IMPOSED ON A JUVENILE OFFENDER CAN PROPERLY BE MEASURED ONLY BY A POST-SENTENCING REVIEW OF HIS OR HER DEVELOPMENT

A lifetime in prison is a punishment reserved for few offenders. 95% of all those incarcerated in state prison will be released.[58] In 2007, the median sentence length for felons sentenced to incarceration was 72 months for rape, 60 months for robbery, 24 months for aggravated assault, and 24 months for burglary.[59] Even in the 75 largest counties in the nation, which account for about half of all reported violent crime in this country, the median sentence was not significantly higher.[60] From 1990 to 2002, in these counties, the median sentence received was 120 months for rape, 60 months for robbery and 48 months for assault.[61]

---

[58] Timothy Hughes & Doris James Wilson, Bureau of Justice Statistics, Reentry Trends in the United States: Inmate Returning to the Community After Serving Time in Prison, http://www.ojp.usdoj.gov/bjs/reentry/reentry.htm (last visited July 21, 2009).

[59] Bureau of Justice Statistics, State Court Sentencing of Convicted Felons, 2004- Statistical Tables – Table 1.3 Mean and Median Felony Sentence Lengths in State Courts, by Offense and Type of Sentence, 2004, *available at* http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04103tab.htm (last visited July 21, 2009). The median calculation includes those sentenced to life or death sentences. *Id.* The mean calculation, which excludes life and death sentences were higher – 123 months for rape, 86 months for robbery, 41 months for aggravated assault, and 40 months for burglary. *Id.*

[60] *See* Brian A. Reaves, *Violent Felons in Large Urban Counties*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (BJS, Wash, D.C.), July 2006, at 1, 8.

[61] *Id.* at 8.

For juveniles, a lifetime in prison has a greater and harsher significance than for adults. Juveniles will grow into adulthood in prison and will serve much longer than adult offenders. Moreover, younger offenders are a vulnerable population in adult facilities, with higher suicide rates and greater risk of physical and sexual assault than adult offenders[62] – of particular concern for those juveniles placed in general population with adults.[63]

In addition, the separate juvenile and adult adjudications of violent offenses distorts a criminal court judge's ability to assess the proportionality of the imposition of a life sentence on a youth. In 2005, juvenile courts disposed of an estimated[64] 81,600 delinquency cases involving violent crime index offenses (murder, non-negligent manslaughter,

---

[62] *See* Martin Forst, Jeffrey Fagan & T. Scott Vivona, *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment Custody Dichotomy*, 40 JUV. & FAM. CT. J., 1989, at 1, 9-10. (finding that young people in adult prisons are at greater risk for sexual and physical assault than both older inmates and comparable youths in juvenile facilities); Michael G. Flaherty, *The National Incidence of Juvenile Suicide in Adult Jails and Juvenile Detention Centers*, 13 SUICIDE AND LIFE THREATENING BEHAVIOR, 85-94 (1983) (finding that the suicide rate for juveniles in jail is eight times that of juveniles in detention centers).

[63] In 1995, "[t]wenty-seven [Department of Corrections] house those offenders under age 18 in the general population of adult institutions or in protective custody within those institutions if needed." *Offenders Under 18 in State Adult Correctional Systems: A National Picture*, SPECIAL ISSUES IN CORRECTIONS, (LIS, Inc., Longmont, Co.), Feb. 1995, at 3, 5-6.

[64] Estimates are based on data from over 2100 courts with jurisdiction over 80% of the juvenile population. Melissa Sickmund, *Delinquency Cases in Juvenile Court, 2005*, OJJDP FACT SHEET, (Office of Juvenile Justice and Delinquency Prevention, Wash. D.C.), June 2009, at 1.

forcible rape, robbery, and aggravated assault).[65] Of the estimated 429,500 total person offense cases disposed of by the juvenile court in 2005, only 3,500 were waived to criminal court.[66] Although cases transferred by judicial waiver do not represent the entire universe of juvenile cases filed in criminal court (statutory exclusion and prosecutor direct file cases), 2005 juvenile arrests data suggests that the vast majority of these violent crime index cases are resolved in juvenile court.[67] Therefore, juvenile courts adjudicated a substantial number of cases involving similarly situated violent offenders never exposed to a life without parole sentence. One study revealed that violent young offenders in the adult system received sentences five times longer than those retained in the juvenile system with similar offense characteristics.[68]

---

[65] According to estimates, juvenile court disposed of 1,400 criminal homicide, 4,400 forcible rape, 26,000 robbery, and 42,900 aggravated assault cases. *Id.* at 2.

[66] *Id.* at 3.

[67] In 2005, an estimated 95,300 violent crime index arrests of juveniles were made, which even assuming that all the person offenses waived to criminal court were violent offenses, still suggests that a substantial number of these cases were resolved in juvenile court – 95,300 – 81,600 (cases in juvenile court) + 3500 (judicial waiver) = 17,200 (cases in criminal court). Howard N. Snyder, *Juvenile Arrests 2005*, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), April 2009, at 3. In 2005, an estimated 7% of all juvenile arrests – 149,800 out of 2.14 million total arrests - were referred directly to criminal court. *Id* at 5.

[68] Cary Rudman et. al, *Violent Youth in Adult Court: Process and Punishment*, 2 CRIME & DELINQUENCY 75, 88-89 (1986); *see also* Marcy Rasmussen Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. OF CRIM. L. & CRIMINOLOGY 449, 485-89 (1996) (finding that violent

The imposition of a life without parole sentence on juveniles must take some account of a juvenile offenders' unique capacity for rehabilitation. Decades of social research shows that most youth "age-out" of engaging in reckless and criminal behavior. During the period of adolescence, because of the developmental deficiencies discussed *infra*, recklessness and most criminal behavior is at its peak.[69] "[M]ost participants in adolescent delinquency desist from involvement by early adulthood, even those most involved during adolescence."[70]

Thus, confidently predicting that a juvenile offender's criminal behavior will persist is almost impossible. Jurists are unable to predict serious criminal behavior in juveniles.[71] The American

---

young offenders in adult courts received sentences about five times longer than violent juvenile offenders).

[69] *See* Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 339 (1992); *see* Patrick H. Tolan & Deborah Gorman-Smith, *Development of Serious and Violent Offending Careers*, in SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS 73 (Rolf Loeber and David Farrington, eds. 1998) (discussing established findings that crime prevalence increases during early adolescence for most crimes, except drug sales, which peaks in early adulthood).

[70] Tolan & Gorman Smith, *supra* n. 69, at 73.

[71] *See* Jeffrey Fagan & Martin Guggenheim, *Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment*, 86 J. OF CRIM. L. & CRIMINOLOGY, 415, 437-38, 447 (1996) (reporting results of a study showing that judges rendered inaccurate predictions of future dangerousness of juveniles in more than eight-out-of-ten cases for preventive detention determinations); *See generally* Norval Morris & Marc Miller, *Predictions of Dangerousness*, 6 CRIME & JUST. 1, 1 (1985) (arguing that, because of limited reliability, "[t]he use of predictions of dangerousness to alter

Psychiatric Association holds the position that "[a]lthough mental health professionals are able to characterize the functional and behavioral features of an individual adolescent, their ability to reliably predict future character formation, dangerousness, or amenability to rehabilitation is inherently limited." Brief for the American Psychological Ass'n, & Missouri Psychological Ass'n as *Amici Curiae* Supporting Respondent at 19, *Roper v. Simmons*, 543 U.S. 551 (2005).

Prior dire predictions about the trends in juvenile offender behavior and patterns similarly have proved inaccurate. Despite forecasts in the 1990's of the juvenile super-predator, the threat never materialized.[72] Since then violent juvenile crime has decreased significantly – the juvenile arrest rate for murder is down 77% from its 1993 peak; the rate for forcible rape is 54% less than its 1991 peak and even below the 1980 level; the rate for robbery is 47% less than its 1995 peak; and the arrest rate for aggravated assault has reached its lowest level since 1980, down 41% from its 1994 peak. Charles Puzzanchera, *Juvenile Arrests 2007*, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice & Delinquency Prevention, Wash. D.C.), April 2009, at 6.

---

individual dispositions should be allowed only to the extent that such dispositions would be justified as deserved independent of those predictions").

[72] *See generally* Shay Bilchik, *Challenging the Myths*, 1999 National Report Series, JUVENILE JUSTICE BULLETIN (Office of Juvenile Justice and Delinquency Prevention, Wash. D.C.), Feb. 2000 (discussing the lack of statistical support for the "super-predator" theory).

Predictions as to juvenile behavior, both globally and individually, have proven erroneous. To ensure that those juveniles sentenced to a lifetime in prison are deserving of such a sentence requires the ability to assess that juvenile once he has entered adulthood. This does not prevent a child with sufficient culpability who does not respond to treatment from serving a very lengthy sentence.

CONCLUSION

Only a post-adolescence review can assure the suitability of a life sentence. Moreover, an opportunity for post-sentencing review of the progress of juveniles allows corrections and social service professionals working closely with juveniles to provide an educated evaluation of that youth's development and progress toward rehabilitation.

Respectfully submitted,

Corrine A. Irish
Counsel of Record
George H. Kendall
Holland & Knight LLP
195 Broadway, 24th floor
New York, New York
(212) 513-3200

Attorney for Amici Curiae

AMICUS CURIAE BRIEF

(24) (25)

Nos. 08-7412 and 08-7621

IN THE

Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On Writ of Certiorari to the Florida District Court of Appeal for the First District

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

KENT S. SCHEIDEGGER
Counsel of Record
LAUREN J. ALTDOERFFER
JANICE C. CHIOU
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

QUESTIONS PRESENTED

1. When the only federal premise for a state procedural default rule is the clearly correct determination that no existing precedent dictates the rule defendant asserts, does the judgment rest on a state ground independent of the different federal question of whether such a rule should be created?

2. If so, does this Court have jurisdiction to consider the merits of whether the new rule should be created?

3. Does the Eighth Amendment forbid the imposition of a life-without-parole sentence upon any defendant for any crime, other than homicide, committed before his 18th birthday, regardless of the circumstances of the offense or the length or severity of his criminal record?

TABLE OF CONTENTS

Questions presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 5

Argument 6

I

The judgment in *Sullivan* rests on an adequate state ground independent of the federal question presented to this Court 6

II

The finality of an executed death sentence makes *Roper* v. *Simmons* fundamentally different from the present case 12

III

The developmental psychology studies proffered by the mental health *amici* do not support a rigid constitutional cutoff at the 18th birthday 14

Conclusion 25

TABLE OF AUTHORITIES

Cases

Ake v. Oklahoma, 470 U. S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985) 9, 10

Bonifay v. State, 909 So. 2d 861 (Fla. 2005) 8

Bullington v. Missouri, 451 U. S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981) 8

Caspari v. Bohlen, 510 U. S. 383, 114 S. Ct. 948, 127 L. Ed. 2d 236 (1994) 8, 9

Chandler v. Crosby, 916 So. 2d 728 (Fla. 2005) ... 11

Cohens v. Virginia, 6 Wheat. (19 U. S.) 264, 5 L. Ed. 257 (1821) 9, 10

Fox Film Corp. v. Muller, 296 U. S. 207, 56 S. Ct. 183, 80 L. Ed. 158 (1935) 10

Furman v. Georgia, 408 U. S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) 13

Gideon v. Wainwright, 153 So. 2d 299 (Fla. 1963) .. 6

Harmelin v. Michigan, 501 U. S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) 12, 25

Morgan v. Illinois, 504 U. S. 719, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992) 13

Roper v. Simmons, 543 U. S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) 8, 12, 13, 14, 23

Saffle v. Parks, 494 U. S. 484, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990) 9

Sochor v. Florida, 504 U. S. 527, 112 S. Ct. 2114, 119 L. Ed. 2d 326 (1992) 7

Solem v. Helm, 463 U. S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983) 13

Teague v. Lane, 489 U. S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) 9

Tyler v. Cain, 533 U. S. 656, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001) 11

Witt v. State, 387 So. 2d 922 (Fla. 1980) 11

United States Constitution

U. S. Const., Amdt. 10 25

United States Statutes

28 U. S. C. § 1257 ..... 6, 12

28 U. S. C. § 2244 ..... 8, 11

28 U. S. C. § 2254 7

28 U. S. C. § 2255 6

Rule of Court

Fla. Rule Crim. Proc. 3.850 (2009) 6, 8, 11

Secondary Sources

American Psychiatric Assoc., Diagnostic and Statistical Manual of Mental Disorders, Cautionary Statement (4th ed. 1994) 21

4 Blackstone, W., Commentaries (1st ed. 1769) . . . 24

Berns, Moore, & Capra, Adolescent Engagement in Dangerous Behaviors Is Associated with Increased White Matter Maturity of Frontal Cortex, 4 PLoS ONE 9, http://www.plosone.org/article/info:doi/10.1371/journal.pone.0006773 19

Brame, Nagin, & Tremblay, Developmental Trajectories of Physical Aggression from School Entry to Late Adolescence, 42 J. Child. Psychiat. 503 (2001) 18

Edens, Skeem, Cruise, & Cauffman, Assessment of "Juvenile Psychopathy" and Its Association with Violence: A Critical Review, 19 Behav. Sci. Law 53 (2001) 21, 22

Epstein, The Myth of the Teen Brain, Scientific American Mind 63 (April/May 2007) 19

Epstein, R., The Case Against Adolescence: Rediscovering the Adult in Every Teen (2007) . . 18

Grisso, T., Double Jeopardy: Adolescent Offenders with Mental Disorders (2004) 21

Lane, How Jaycee Lee Dugard's Tormentor Got Out, http://voices.washingtonpost.com/postpartisan/2009/09/how_jaycee_lee_duggards_tormen.html 24

Moffitt, A Review of Research on the Taxonomy of Life-Course-Persistent Versus Adolescence-Limited Antisocial Behavior, in Taking Stock: The Status of Criminological Theory (F. Cullen, J. Wright & K. Blevins eds. 2006) 18, 23

Moffitt, Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy, 100 Pscyhol. Rev. 674 (1993) 15, 17, 19, 20, 23

Moffitt, Caspi, Dickson, Silva, & Stanton, Childhood-Onset Versus Adolescent-Onset Antisocial Conduct Problems in Males: Natural History from Ages 3 to 18 Years, 8 Dev. & Psychopathology (1996) 20, 22, 23

Moffitt, Caspi, Harrington, & Milne, Males on the Life-Course-Persistent and Adolescence-Limited Antisocial Pathways: Follow-up at Age 26 Years, 14 Dev. & Psychopathology (2002) 20

Mulvey & Cauffman, The Inherent Limits of Predicting School Violence, 56 Am. Psychologist 797 (2001) 20, 21

U. S. Dept. of Justice, Federal Bureau of Investigation, Age-Specific Arrest Rates and Race-Specific Arrest Rates for Selected Offenses 1965-1985 (1986) 16

U. S. Dept. of Justice, Federal Bureau of Investigation, Age-Specific Arrest Rates and Race-Specific Arrest Rates for Selected Offenses 1993-2001 (2003) 16

Vitacco, Caldwell, Van Rybroek, & Gabel, Psychopathy and Behavioral Correlates of Victim Injury in Serious Juvenile Offenders, 33 Aggressive Behav. 537 (2007) 21

IN THE

Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Petitioners in these cases seek to place a constitutional constraint on the states forbidding a life-without-parole sentence for anyone prior to his 18th birthday, regardless of the offense (possibly excepting homicide) and regardless of the person's criminal history. In a few extreme cases, society and the victims of crime need the assurance that perpetrators will never be released through routine parole proceedings but only, if ever, through executive clemency, which in most states is a decision made by an official directly responsible to the people. The rule petitioners seek is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

A. Graham v. Florida.

On December 6, 2004, 31 days short of Terrance Graham's 18th birthday, see J. A. (Graham) 50; Brief for Petitioner Graham 11, armed robbers forced their way into the home of Carlos Rodriguez in Jacksonville, Florida, locked him in a closet at gunpoint, and robbed a friend who was present in the apartment. J. A. 111-115. Mr. Rodriguez positively identified Graham as the first one in the door, the one who pointed a gun at his stomach, and the one who appeared to be the leader of the group. J. A. 318. There is also substantial circumstantial evidence that Graham was a party to another home invasion robbery later the same night. J. A. 58.

These crimes were not Graham's first. At the age of 16, he pleaded guilty to the robbery of a restaurant, during which "his codefendant assaulted the restaurant

owner with a pipe." J. A. 407. He received a lenient sentence for this crime of only "three years' probation with the condition that he serve twelve months in a pre-trial detention facility." J. A. 407. He was out of jail less than six months before committing the robberies for which he was caught, but upon his arrest he admitted to the police that "he was involved in 'two or three before tonight.' " J. A. 407.

"Following the probation hearing, the trial court found appellant guilty of the alleged violations and sentenced him to life imprisonment without the possibility of parole." J. A. 408. The trial judge noted that many people had tried to help him turn his life around after the first robbery, and he had chosen to throw it away. *Ibid.* The Court of Appeal rejected the claims that a life sentence for juveniles was *per se* unconstitutional and that his sentence was grossly disproportionate to his crime. J. A. 431. The Florida Supreme Court denied review. J. A. 433.

B. Sullivan v. Florida.

In 1989, Joe Sullivan, then age 13, burglarized the home of an elderly woman along with two accomplices. See Brief in Opposition (BIO) 3. Later that day, Sullivan and one of the accomplices returned to the home. While the accomplice distracted the woman at the front door, Sullivan began to enter through another door. *Ibid.* He forced his way in as she resisted the entry. He covered her head, removed her clothes, beat her, raped her vaginally and orally, and threatened to kill her. The identification of Sullivan, rather than the accomplice, as the perpetrator was made by the victim's recognition of his voice, both a neighbor and a police officer who saw him running from the house, and his palm print in the bedroom. BIO 4-5. Sullivan had been found guilty of 17 crimes in the prior two years, includ-

ing several felonies, one of which was a burglary. BIO 5. During a previous juvenile detention, he had assaulted other clients. BIO 5-6.

Sullivan was convicted of two counts of sexual battery and two counts of burglary. He was sentenced to life in prison on the sexual battery counts. J. A. (Sullivan) 21. The conviction and sentence were affirmed on direct appeal. J. A. 22. A motion for postconviction relief was denied. J. A. 23. A writ of habeas corpus was denied. J. A. 24-25. On July 24, 2007, Sullivan commenced the present proceeding, a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. J. A. 21.

Rule 3.850 has a time limit of two years after the judgment became final with an exception, among others, for newly established, retroactive constitutional rights. Rule 3.850(b)(2); Brief for Respondent (No. 08-7621) 2. Sullivan argued to the trial court that, "*Roper v. Simmons* dictates sentencing relief for thirteen-year-olds sentenced to die in prison." J. A. 37 (capitalization altered). The trial court found, "*Roper* has established no such constitutional right. Rather, *Roper* established only one new constitutional right, the right for a juvenile not to be given the death penalty." J. A. 58. "Hence, Defendant's claim does not fit into any exception to the time limits in rule 3.850 and must be dismissed as procedurally barred." *Ibid.* The trial court also found in the alternative that Sullivan's "argument is meritless." *Ibid.* The Florida Court of Appeal summarily affirmed. J. A. 73. "In this posture of the case, Florida law precluded review by the state Supreme Court." Brief for Petitioner 4.

SUMMARY OF ARGUMENT

In *Sullivan*, the state court decision rests on a state ground that is independent of the question petitioner asks this Court to decide. The only federal premise of the state court's decision is the clearly correct statement that *Roper* v. *Simmons* did not establish a new right regarding noncapital sentences. Under *Fox Film Corp.* v. *Muller*, a clearly correct federal premise to a court ruling on state law is insufficient to give this court jurisdiction to review a different federal question not necessary to the judgment.

The developmental psychology research cited in the brief of the mental health *amici* does not support the rule petitioners seek. On the contrary, that research supports the conclusion that teenagers are not a homogenous mass, and courts can and should distinguish the differences among them. Some teens engage in significant illegal behavior only in adolescence and are likely to desist in young adulthood. Others are life-course-persistent offenders who are likely to victimize others into middle age if we let them. The latter group is distinguished by the length of antisocial behavior and by the commission of crimes of violence, the same factors courts typically use in determining sentences.

ARGUMENT

I. The judgment in *Sullivan* rests on an adequate state ground independent of the federal question presented to this Court.

In *Sullivan*, No. 08-7621, the case comes to this Court on a writ of certiorari to a state court under 28 U. S. C. § 1257. The state court petition under Florida Rule of Criminal Procedure 3.850 (2009) ("Rule 3.850") was petitioner's third collateral attack on the judgment, see J. A. 22-24, and it was commenced 16 years after the judgment became final on direct appeal. See J. A. 21-22. The Florida rule, like its federal counterpart, has both a time limitation and a successive petition limitation. See Rule 3.850(b), (f); cf. 28 U. S. C. §§ 2255(f), (h).[2] The Circuit Court held,

> "Consequently, at this time, the Court may address Defendant's claims only if they fall into the enumerated exceptions to the two-year time limitation and could not have been raised in Defendant's original 3.850 motion. Defendant's claim under *Roper* could not have been raised in his original 3.850 motion because his motion was filed many years before the United States Supreme Court ruled on *Roper*, thereby escaping dismissal based on successiveness. However, the Court finds that the claim raised in the instant motion, based on *Roper*, does not fit into the limited category of claims allowed to be brought after the expiration of the two-year filing period." J. A. 56-57.

---

2. The predecessor of Rule 3.850 was substantially a copy of 28 U. S. C. § 2255. See *Gideon* v. *Wainwright*, 153 So. 2d 299, 300 (Fla. 1963) (on remand). The state and federal rules have since diverged somewhat.

If this holding is an adequate and independent state ground, then review in this Court under § 1257 is jurisdictionally barred. See *Sochor* v. *Florida*, 504 U. S. 527, 535, n. * (1992). At the certiorari stage, petitioner attempted to brush off this issue with the conclusory assertion that the state court judgment rested on a "threshold evaluation of the underlying federal constitutional claim." Reply to Pet. for Cert. 9. Remarkably, petitioner does not address the issue at all in his brief on the merits. Obviously, the Court's decision to grant the writ of certiorari cannot be construed to have resolved this question, if for no other reason because a decision to grant that writ does not require a majority of the Court.

The problem requires a closer examination. Many states, like the federal government, have struggled to place reasonable limits on collateral review to bring some finality to criminal cases, while still holding open the possibility of relief for cases of genuine miscarriages of justice.[3] This process has produced rules with intricate exceptions. A federal procedural default doctrine that punished states for making exceptions, brushing aside their judgments in cases not qualifying for the exceptions, would be perverse and would encourage the adoption of draconian rules. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Beard* v. *Kindler*, No. 08-992, p. 28. A state *could* shut off its collateral review process to all delayed claims without regard to retroactive new rules subsequently created by this Court. However, such a rule would, at best, throw cases into federal court that could have been resolved in state court. Conceivably, such a rule might cut off relief altogether under 28 U. S. C.

---

3. This point will be addressed further in our brief in *Wood* v. *Allen*, No. 08-9156, to be filed shortly after this brief.

§2254(d), if the original state-court decision was a reasonable application of the then-existing Supreme Court precedent, or under 28 U. S. C. §2244(b)(1), if the claim had been presented in a prior federal petition. Encouraging states to adopt such severe rules would be bad policy.

States should be permitted to make an exception to their timeliness and successive petition rules for *direct* application of retroactive new rules created by this Court without opening their judgments to renewed attack in federal court based on every attempt to *extend* this Court's recent precedents. The distinction between what *Roper* v. *Simmons*, 543 U. S. 551 (2005), dictates and whether its rule should be extended into new territory is important to a correct analysis of the jurisdictional problem in this case.

There is no dispute that *Roper* created a new rule, and that it "has been held to apply retroactively," see Rule 3.850(b)(2), to cases on collateral review in Florida state courts. See *Bonifay* v. *State*, 909 So. 2d 861, 861 (Fla. 2005). There should be no genuine dispute that *Roper* by its terms does not dictate extension of its rule to noncapital cases. See 543 U. S., at 568 (special considerations for capital punishment); *id.*, at 572 (explicit premise that life without parole remains available). To the extent that Sullivan argued to the state courts that it does, see J. A. 37, it would be an understatement to call that argument frivolous.

Caspari v. *Bohlen*, 510 U. S. 383 (1994), illustrates the point. Bohlen sought to extend a rule developed for capital cases in *Bullington* v. *Missouri*, 451 U. S. 430 (1981), to noncapital cases. Without dissent on this point, the Court held that the capital-case holding of *Bullington* did not dictate its extension to noncapital cases, noting "the unique circumstances of a capital

sentencing proceeding." *Caspari, supra,* at 392.[4] "Even were [this Court] to agree with [Sullivan's] assertion that [its] decision[] in [*Roper*] inform[s], or even control[s] or govern[s], the analysis of his claim, it does not follow that [it] compel[s] the rule that [Sullivan] seeks." *Saffle* v. *Parks*, 494 U. S. 484, 491 (1990). Sullivan is seeking to create a new rule beyond *Roper*, not just the application of *Roper* to his case.

To the extent that the state court ruling is based on the determination that no existing precedent states the rule Sullivan seeks, that ruling is based on a federal-law premise, but it is a premise that is correct beyond genuine question. *Ake* v. *Oklahoma*, 470 U. S. 68, 75 (1985), contains broad language stating, "when a resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded." In applying this precedent, one must recall the

> "maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens* v. *Virginia*, 6 Wheat. (19 U. S.) 264, 399 (1821).

---

4. The Court held that because the proposed rule would be new under *Teague* v. *Lane*, 489 U. S. 288 (1989), and the *Teague* issue had not been waived, the Court "had no occasion" to consider the merits. *Id.*, at 397. Justice Stevens, the lone dissenter, concluded the State had waived the *Teague* issue, *ibid.*, there was therefore no need to decide the *Teague* issue, *ibid.*, and he would rule for Bohlen on the merits. *Id.*, at 398. He did not express any disagreement with the conclusion that Bohlen's proposed rule would be new for the purpose of *Teague*.

The state rule at issue in *Ake* had an exception for all federal constitutional error, so the federal premise of the state-law ruling was precisely the merits of the question presented to this Court on certiorari. See 470 U. S., at 74-75. The question of whether a state-law ruling with a federal premise different from the merits precludes jurisdiction was not before the Court in *Ake*, and to the extent "some expressions are used which go far beyond" the question that was presented, they should not be considered controlling. *Cohens*, *supra*, at 400.

Fox Film Corp. v. *Muller*, 296 U. S. 207 (1935), involved a state-court ruling with a clearly correct federal premise. That case involved a contract with an arbitration clause that violated federal antitrust law. The state court decided that the clause was not severable from the remainder of the contract. The federal premise was clearly correct, based on a precedent of this Court striking down an identical clause, and severability was not a federal question. See *id.*, at 210. The Court therefore had no jurisdiction to decide another, disputed federal question that was not necessary to the judgment. See *id.*, at 211. *Ake* did not purport to overrule *Fox Film*, and the latter remains good law.

One difference between *Fox Film* and the present case is that in *Fox Film* the federal premise of the state-law ruling was expressly conceded, see *id.*, at 210, while in the present case the petitioner did make a frivolous argument contrary to that premise. See *supra*, at 8. That distinction should not make a difference. A party should neither be penalized for conceding a point where the law is clear nor rewarded for making an insubstantial argument to the contrary.

The jurisdictional question in this case therefore depends on whether the state court, in order to deny Sullivan's petition, needed to decide only that *Roper*

does not by itself dictate the rule that he seeks or whether it also needed to decide that *Roper* should not be extended to include the rule he seeks. The answer to that question depends on Florida law.

In *Tyler* v. *Cain*, 533 U. S. 656 (2001), this Court considered a similar provision of the federal successive petition statute, making an exception for a "claim [that] relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable . . . ." 28 U. S. C. § 2244(b)(2)(A); *Tyler*, *supra*, at 659. The District Court was required to dismiss the claim because this Court had not yet made the precedent in question retroactive, and that was sufficient to decide the case in that court. See *Tyler*, *supra*, at 667. This Court also decided that it could not make the decision retroactive on review of the District Court's decision. *Id.*, at 667-668.

Florida Rule 3.850(b)(2), unlike the statute in *Tyler*, does not expressly say by whom the new rule has been "established . . . and has been held to apply retroactively," but the Florida Supreme Court has filled in the gap. Only rules created by this Court or the Florida Supreme Court can be retroactive on collateral review. See *Witt* v. *State*, 387 So. 2d 922, 930-931 (Fla. 1980); *Chandler* v. *Crosby*, 916 So. 2d 728, 729 (Fla. 2005) (*per curiam*).

To decide that the (b)(2) exception was inapplicable, the Circuit Court in this case needed only to decide that the right Sullivan sought had not yet been established by this Court or the Florida Supreme Court. The Circuit Court had no authority to extend *Roper* and make the extension retroactive. Nor did the Court of Appeal, so it was correct to summarily affirm. "Florida law precluded review by the state Supreme Court." Brief for Petitioner 4. The Court of Appeal is therefore

"the highest court of [the] State in which a decision could be had," 28 U. S. C. § 1257(a), and this Court's writ of certiorari runs to that court. If this Court cannot reverse a lower federal court that correctly dismissed a petition as procedurally barred based on existing law, as it held in *Tyler*, then surely it cannot reverse a state court in similar circumstances.

The judgments of the Circuit Court and the Court of Appeal in this case are independent of the federal question of whether *Roper* should be extended to noncapital, nonhomicide cases, the question presented in this Court. Those judgments depend only on the clearly correct determination that *Roper* itself does not establish such a rule.

The judgments below do not depend on any genuinely disputable federal question. Jurisdiction under 28 U. S. C. § 1257 is lacking.

II. The finality of an executed death sentence makes *Roper* v. *Simmons* fundamentally different from the present case.

Petitioners and supporting *amici* rely heavily on *Roper* v. *Simmons*, 543 U. S. 551 (2005), but there is a critically important difference between that case and this one. Once a death sentence is executed, neither an executive commutation nor a legislative repeal will have any effect. In contrast, a person sentenced to life without parole at the age of 17 will have decades to demonstrate that the predictions about him were wrong by leading an exemplary life in prison. Many Governors of Florida will come and go during Graham's life expectancy. If he behaves himself as a model prisoner, it is not unrealistic to expect one of them will grant clemency. *Harmelin* v. *Michigan*, 501 U. S. 957, 996 (1991) (opinion of the Court), noted that even a life-

without-parole sentence does not negate all possibility of release and distinguished capital punishment on that basis. To the extent that *Solem* v. *Helm*, 463 U. S. 277, 297 (1983), is inconsistent with this passage and implies that life without parole is in a special category comparable to capital punishment, *Solem* should be considered overruled.

For decades, we have heard the incessant drumbeat that death is different. See, *e.g.*, *Furman* v. *Georgia*, 408 U. S. 238, 306 (1972) (opinion of Stewart, J.). Suddenly and magically, it seems, death is no longer different. A sentence of life without parole is now described as a sentence "to die in prison." See, *e.g.*, Brief for Petitioner Sullivan 55. Is there no longer a difference of importance between the two sentences? If so, the entire "annually improvised Eighth Amendment, 'death is different' jurisprudence," *Morgan* v. *Illinois*, 504 U. S. 719, 751 (1992) (Scalia, J., dissenting), is based on a false premise. The decades of litigation and millions of dollars spent disputing whether states have complied with it are pointless. If death is not different after all, the entire structure from *Furman* onward should be overruled.

But of course death is different. If the State of Missouri had executed Simmons, there would have been no opportunity for him to demonstrate rehabilitation and seek clemency. Graham and Sullivan face no such cutoff. Sullivan has already been in prison for nearly two decades. If he has been a model prisoner, he can apply for clemency now. If further advances in psychology ten years hence show us clearly who can be safely released, Graham and Sullivan will probably still be alive to receive the benefit if they qualify.

Roper, 543 U. S., at 574, noted that its categorical rule was subject to the "objection always raised against categorical rules." Indeed it was, and the objection is a

strong one. The objection is particularly strong when a litigant proposes to find a categorical rule in the Constitution that does not appear in the text and has not been found there in the two centuries since its enactment. For this Court to impose a categorical restriction and thereby remove the policy question from the people is a drastic step, to be reserved for drastic circumstances. In *Roper*, a bare majority of the Court decided to take that step despite a clear precedent to the contrary. See *id.*, at 556. It is debatable whether the Court should have gone that far, but it should go no further. *Roper* itself should be the end of this road.

III. The developmental psychology studies proffered by the mental health *amici* do not support a rigid constitutional cutoff at the 18th birthday.

An *amicus* brief has been filed in support of Petitioners by four mental health organizations: The American Psychological Association, the American Psychiatric Association, the National Association of Social Workers, and Mental Health America. For brevity, we will refer to this as the APA Brief. The brief would make a powerful case if it were submitted on the question of whether *all* or *most* adolescents should be tried in adult court and subjected to adult penalties. That question, however, is not before this Court, and it probably never will be. The question is whether to draw a sharp line at the 18th birthday and declare permanently, as a matter of constitutional law, that *no one* less than 18 may *ever* be sentenced to life without

parole, at least for nonhomicides.[5] The science submitted in the APA Brief provides no support for that proposition.

The fallacy that lies throughout the APA Brief is its persistent lumping together of all adolescents into one group and all delinquent behavior, along with risky and impulsive behavior, into one construct. Not only is this not supported by the research the APA Brief cites, it is contradicted by that research.

The APA Brief obscures an important difference by smearing together different kinds of behavior. At pages 7-9, the brief puts emphasis on the greater propensity of teenagers to engage in risky behavior and notes that "risky behavior frequently includes criminal activity . . . ." *Id.*, at 7. The fact that two categories of behavior overlap does not mean they are the same. Skydiving is *risky*; drinking one beer at age 20 is *illegal*; forcible rape is *evil*. These categories are different in kind, and a greater propensity for one does not equal reduced culpability for another, even if some behaviors fall into more than one category.

After defining "adolescence" for the purpose of their brief as ending at 17, see APA Brief at 6, n. 3, *amici* claim, "Both violent crimes and less serious offenses 'peak sharply' in late adolescence—around age 17—and 'drop precipitously in young adulthood.' " APA Brief 8 (footnotes omitted). The inner quotes are from Moffitt, Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy, 100 Psychol. Rev. 674, 675 (1993) (cited below as "Moffitt (1993)"), and refer to overall crime rates, *not* violent

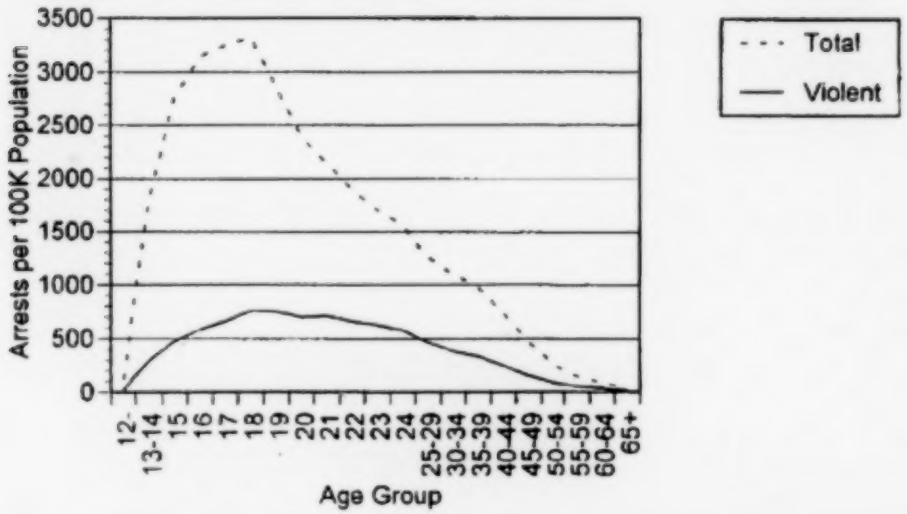
---

5. If petitioners prevail in these cases, the ink will not be dry on the opinion before the same forces are back claiming the same rule must apply to homicides.

crime rates. The rates for violent crime neither peak at 17, nor "drop precipitously in young adulthood."

Figure 1 shows arrest rates for crimes in the FBI's total and violent crime indices by age for 2001. See U. S. Dept. of Justice, Federal Bureau of Investigation, Age-Specific Arrest Rates and Race-Specific Arrest Rates for Selected Offenses 1993-2001, pp. 4, 6 (2003). The violent peak is at 18-19, the rates for those two ages being nearly equal. The decline in young adulthood is gradual. At age 22, the rate is about the same as at 17, and at age 24 it is about the same as at 16.

Figure 1. Total and Violent Crime Rates By Age, 2001



The age profiles of violent crime change across time and across cultures. Figure 2 shows the violent index crime arrest rates by age for 1965 and 2001.[6] Not only

6. The solid line in Figure 2 is the same as the solid line in Figure 1, although plotted on a different scale. The dashed line, for 1965, is computed from data in U. S. Dept. of Justice, Federal

was violent crime lower in 1965, but the age profile peaked later and remained nearly flat through the early 20s.

Figure 2. Violent Crime Rates By Age, 1965 and 2001

What accounts for the sharp increase in *total* offending in the teen years, with a sharp decline in adulthood, and the considerably less spiked rate of *violent* offenses in the same years? One widely credited explanation is that the teen years in Western cultures see a large increase "in the number of people who are willing to offend . . . ." Moffitt (1993) 675-676. The teen peak is caused by a large portion of the population that begins offending in the teen years and soon desists, but underneath the peak is another group that has been aggressive and antisocial from childhood and is likely to continue offending throughout the life course. See *id.*,

---

Bureau of Investigation, Age-Specific Arrest Rates and Race-Specific Arrest Rates for Selected Offenses 1965-1985, pp. 3-33 (1986).

at 677-678. That underlying group commits a disproportionate share of the violent crimes.

Multiple longitudinal studies have confirmed the pattern. See Moffitt, A Review of Research on the Taxonomy of Life-Course-Persistent Versus Adolescence-Limited Antisocial Behavior 277, 292-293, in Taking Stock: The Status of Criminological Theory (F. Cullen, J. Wright & K. Blevins eds. 2006). Moffitt's findings come from a longitudinal study in Dunedin, New Zealand. The group that began delinquent behavior in adolescence generally committed nonviolent offenses, while the group that began serious, aggressive misbehavior in childhood was more likely to commit violent offenses. *Ibid.* Another longitudinal study in Canada similarly found that violence in adolescence was typically part of a long-term pattern of behavior. See Brame, Nagin, & Tremblay, Developmental Trajectories of Physical Aggression from School Entry to Late Adolescence, 42 J. Child. Psychiatry 503, 510 (2001).

Cross-cultural comparisons are also revealing. In preindustrial societies where teenagers are treated as adults, the increase in delinquent behavior among young males is either extremely mild or completely absent. See R. Epstein, The Case Against Adolescence: Rediscovering the Adult in Every Teen 81 (2007). It is when societies become Westernized that adolescent delinquency rises. See *id.*, at 81-85. This variation confirms that the high rates of crime among adolescents is not inherent or biological, but rather a product of culture or the interactions of biology and culture.

The APA Brief, at 22-27, also claims physical immaturity of the teen brain as a reason for risk-taking and

poor judgment.[7] However, individuals mature at different rates, and if the immature brain hypothesis were true, one would expect that among individuals of the same age, brain maturity would be negatively correlated with dangerous behavior. A recent study finds just the opposite. See Berns, Moore, & Capra, Adolescent Engagement in Dangerous Behaviors Is Associated with Increased White Matter Maturity of Frontal Cortex, 4 PLoS ONE 9, http://www.plosone.org/article/info:doi/10.1371/journal.pone.0006773.

These "results are consistent with the maturity gap theory." *Id.*, at 9. The rise of dangerous and delinquent behavior in the teen years is not because of immature brains but the result of society treating physically mature young people as if they were children, denying them adult responsibility and status. See Epstein, The Myth of the Teen Brain, Scientific American Mind 63 (April/May 2007). Treating teenagers like children is the problem, not the answer, for most teens. According to Moffitt, the maturity gap is a major reason for the short-lived delinquency of the larger, less serious group of teen offenders, and they grow out of it. See Moffitt (1993) 687, 690. A smaller group does not.

The argument of the APA Brief varies from the science that it cites in its assertion that adolescents must be treated as one indistinguishable mass. "Research has documented that the vast majority of youthful offenders will desist from criminal behavior in adulthood. And the malleability of adolescence means that there is no reliable way to identify the minority who will not." APA Brief 4. Yet the APA Brief relies heavily on the work of Terrie Moffitt, see *id.*, at 8, 20,

---

7. As discussed *supra*, at 15, an additional problem with this argument is equating risky behavior and poor judgment with deliberate acts of harm to others.

and the central theme of Moffitt's work is that adolescents are *not* a homogenous mass. Rather, "delinquency conceals 2 distinct categories of individuals, each with a unique natural history and etiology." Moffitt (1993) 674.

According to Moffitt's theory, there are multiple subgroups with different patterns of offending. The two with the highest rates of offending during adolescence are termed the adolescence-limited (AL) group and the life-course-persistent (LCP) group. The AL group, in this theory, is likely to desist from offending in young adulthood, while the LCP group is not. See Moffitt, *et al.*, Childhood-Onset Versus Adolescent-Onset Antisocial Conduct Problems in Males: Natural History from Ages 3 to 18 Years, 8 Dev. & Psychopathology 399, 400 (1996) (cited below as "Moffitt (1996)"). Follow-up research required a modification of the theory. The AL group continued property offenses into adulthood but had a significantly lower rate of violent offenses. See Moffitt, Caspi, Harrington, & Milne, Males on the Life-Course-Persistent and Adolescence-Limited Antisocial Pathways: Follow-up at Age 26 Years, 14 Dev. & Psychopathology 179, 187 (2002).

Contending that adolescents who will desist are indistinguishable from those who will not, the APA Brief cites several sources that only tangentially support that proposition, see APA Brief at 21, while ignoring the body of work they relied on the page before. See *id.*, at 20. The first source the APA Brief cites is Mulvey and Cauffman, The Inherent Limits of Predicting School Violence, 56 Am. Psychologist 797 (2001). As the title of their article implies, Mulvey and Cauffman address the problem of predicting which high schools students will commit acts of violence such as the Columbine massacre. See *id.*, at 797. Predicting

which adolescents among those who have already committed an act of great violence will do so again as adults is not their concern. The paragraph cited by the APA Brief, see *id.*, at 798-799, notes the changing nature of youth in passing to support the point that instruments designed for adults may be inappropriate. The passage provides little or no support for the proposition that identification of likely recidivists among known violent adolescent offenders is inherently impossible.

Thomas Grisso, Double Jeopardy: Adolescent Offenders with Mental Disorders 64-65 (2004), discusses identification of mental disorders. In particular, this passage discusses whether mental states of mood or anger observed by a clinician are stable enough to form the basis of a diagnosis. However, diagnosis according to the DSM and evaluation of criminal culpability are different matters. See American Psychiatric Assoc., Diagnostic and Statistical Manual of Mental Disorders, Cautionary Statement, p. xxvii (4th ed. 1994). Other research indicates that mental states such as anger are indeed poor predictors of future violence, but the variety of crimes a juvenile commits and the age at which he begins are much better predictors. See Vitacco, Caldwell, Van Rybroek, and Gabel, Psychopathy and Behavioral Correlates of Victim Injury in Serious Juvenile Offenders, 33 Aggressive Behavior 537, 541 (2007).

Edens, Skeem, Cruise, and Cauffman, Assessment of "Juvenile Psychopathy" and Its Association with Violence: A Critical Review, 19 Behav. Sci. Law 53 (2001), is a technical article discussing the validity for use with juveniles of various instruments for assessing psychopathy. The page cited by the APA Brief, see *id.*, at 59, discusses the age-inappropriateness of some of the items on one instrument, the PCL-R, that is the

"gold standard" for use with adults. See *id.*, at 54. For example, one need not be a psychologist to know that "grandiose sense of self-worth," see *id.*, at 59, is a characteristic many teenagers have and most grow out of. The fact that this characteristic is associated with psychopathy in adults does not mean that it is similarly associated in adolescents.

The Edens article supports the proposition that existing measures of psychopathy are not sufficiently validated for courts to use in sentencing minors. See *id.*, at 74. It does not support the proposition that there is no subgroup of adolescents too dangerous to ever release from prison or that such a subgroup is inherently indistinguishable from the mass, no matter what tools we may develop in the future.

The body of research on "life-course persistent" offenders points in the other direction. According to Moffitt and her colleagues, the AL and LCP groups *are* distinguishable, and they are distinguishable in ways known to the criminal/juvenile justice system.

It is true that the AL and LCP groups are not distinguished by broad measures of antisocial behavior taken in midadolescence. See Moffitt (1996) 409. It is also true that in Moffitt's study the two groups did not differ on number of convictions in adolescence or age of first arrest or conviction. See *id.*, at 413-414. However, the theory predicted "they should differ on convictions for violence," *id.*, at 412, and indeed they did, with a highly significant $p<.01$.[8] See *id.*, at 414. The LCP group was three times as likely to be convicted of a

---

8. The p statistic represents the probability that an observed result could have happened by chance. The lower the p, the more conclusively the random chance possibility is negated. A result with p less than .05 is regarded as "statistically significant."

violent offense before age 18 as the AL group, and six times as likely as the average of the total sample. See *id.*, at 413, Table 2. This increased level of violence persists into adulthood. See Moffitt (2006) 293. This research is consistent with common sense. The first step toward identifying the incorrigibles is simply to separate the rapists and armed robbers from the shoplifters and joyriders. The second step is to separate the repeaters from those who have committed only one serious offense.

Roper v. *Simmons*, 543 U. S. 551, 570 (2005), noted that "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." It may be less supportable to draw that conclusion from a single crime as the only evidence, but that does not mean that no one under 18 is "irretrievably depraved." "Interventions with life-course-persistent persons have met with dismal results . . . . The well-documented resistance of antisocial personality disorder to treatments of all kinds seems to suggest that the life-course-persistent style is fixed sometime before age 18 . . . ." Moffitt (1993) 684 (citations omitted).

Incorrigibles do exist. Whether the present state of knowledge permits identification of persistent offenders with the degree of certainty required for a psychiatric diagnosis is beside the point. This Court is being asked to lay down a constitutional mandate that can only be overturned by the drastic measure of amending the federal Constitution. The limitations of knowledge of the moment provide a reason to refrain from such a step, not a reason to take that step. The potential consequences of error here are not to be taken lightly.

The kidnapping of 11-year-old Jaycee Lee Dugard and her 18-year imprisonment provide a cautionary tale of how parole decisions can go horribly wrong, with

devastating consequences for innocent people. See Lane, How Jaycee Lee Dugard's Tormentor Got Out, http://voices.washingtonpost.com/postpartisan/2009/09/how_jaycee_lee_duggards_tormen.html. Phillip Garrido was sentenced to 50 years for a prior kidnapping in which he committed repeated sexual assaults on the victim for hours. Yet he was back on the street in only 11 years, and the unimaginable ordeal for Jaycee was the result.

The question of where to strike the balance between the risk of release for innocent people and the need to offer a second chance to offenders is not an easy one. There is no clearly correct answer.

Blackstone noted that ancient Saxon law had fairly rigid age categories.

> "But by the law, as it now stands, and has stood at least ever since the time of Edward the third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in these cases our maxim is that '*malitia supplet aetatem*.' "[9] 4 W. Blackstone, Commentaries 23 (1st ed. 1769).

Sullivan's extensive criminal record compiled by the age of 13 demonstrates the continuing truth of Blackstone's observation. Does the science to date require a rejection of this wisdom and reversion to the pre-Edward III approach of rigid categories based solely on chronological age? No, it does not, and the APA *amici* come close to admitting as much. See APA Brief 6, n. 3.

---

9. Malice supplies age.

No one disputes that minors generally should be treated differently from adults. However, the extent to which we should use minimum-age cutoffs versus individual assessment is one of policy. This policy question is one of the many that the Constitution leaves to the people of the several States, not one of the few it has removed from them. See U. S. Const., Amdt. 10. This Court need not endorse Florida's sentencing policy. See *Harmelin* v. *Michigan*, 501 U. S. 957, 1007 (1991) (Kennedy, J., concurring in part and concurring in the judgment). It need only recognize where the authority to make the decision lies. Proposals for change should be addressed to the legislature.

CONCLUSION

In *Graham*, the judgment of the Florida District Court of Appeal should be affirmed. In *Sullivan*, the writ of certiorari should be dismissed for lack of jurisdiction.

September, 2009

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JUL 23 2009
OFFICE OF THE CLERK

133

(II) (II)

Nos. 08-7412, 08-7621

In the Supreme Court of the United States

Terrance Jamar Graham,

Petitioner,

v.

State of Florida,

Respondent.

Joe Harris Sullivan,

Petitioner,

v.

State of Florida,

Respondent.

On Writs of Certiorari to the First District Court of Appeal of Florida

BRIEF OF DISABILITY RIGHTS LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Paula D. Pearlman
Carly J. Munson
Disability Rights Legal Center
919 Albany St.
Los Angeles, CA 90015
(213) 736-1031

Neil M. Soltman
Counsel of Record
Mayer Brown LLP
350 South Grand Ave.
Los Angeles, CA 90071
(213) 229-9500

Additional counsel listed inside front cover

BOTH 4VGYDY

84b 33

Donald M. Falk
Mayer Brown LLP
Two Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306
(650) 331-2000

Brian J. Wong
Mayer Brown LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

A. Life Without Parole Is An Unconstitutionally Disproportionate Punishment Because Juveniles Are Less Morally Culpable 6

B. The High Prevalence Of Disabilities Among Juvenile Offenders Makes Judicial Assessment Of Their Culpability Insufficiently Reliable To Support Irrevocable Punishment 8

1. Juveniles With Disabilities Are Disproportionately Affected By The Criminal Justice System 9

2. Sporadic Recognition Of Juvenile Disability Further Impedes The Reliable Assessment Of Juvenile Culpability 12

3. Juveniles With Disabilities Are Systematically Disadvantaged In Their Dealings With The Criminal Justice System 15

C. The Presence Of Disability Exacerbates The Unconstitutional Disproportionality Of Juvenile Life-Without-Parole Sentences 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Anders v. *California*, 386 U.S. 738 (1967) 18
Atkins v. *Virginia*, 536 U.S. 304 (2002) 16, 22
Eddings v. *Oklahoma*, 455 U.S. 104 (1982) 6
In re Gault, 387 U.S. 1 (1967) 18
Green v. *Johnson*, 513 F. Supp. 965 (D. Mass. 1981) 21
Lee v. *Weisman*, 505 U.S. 577 (1992) 7
Roper v. *Simmons*, 543 U.S. 551 (2005) .....*passim*
Thompson v. *Oklahoma*, 487 U.S. 815 (1988) 3, 5, 6, 7

STATUTES, RULES, AND REGULATIONS

20 U.S.C. § 1412(a)(1)(A) 21
20 U.S.C. § 1412(a)(11)(C) 21
20 U.S.C. § 1412(a)(3) 14
Fla. Stat. Ann. § 985.56(1) 5

OTHER AUTHORITIES

ABA Juvenile Justice Center, *Special Ed Kids In The Justice System: How To Recognize and Treat Young People with Disabilities that Compromise Their Ability To Comprehend, Learn, and Behave* (Lourdes M. Rosado ed., 2000) 11
Norman Brier, *The Relationship Between Learning Disability and Delinquency: A Review and Reappraisal*, 22 J. Learning Disabilities 546 (1989) 11

TABLE OF AUTHORITIES—continued

Page(s)

Margaret A. Bowring & Maria Kovacs, *Difficulties in Diagnosing Manic Disorders Among Children and Adolescents*, 31 J. Am. Acad. Child. Adolescent Psych. 611 (1992) 13

Gabrielle A. Carlson, *The Challenge of Diagnosing Depression in Childhood and Adolescence*, 61 J. Affective Disorders 3 (2000)..... 13

Judith Cockram, *Justice or Differential Treatment? Sentencing of Offenders with an Intellectual Disability*, 30 J. Intell. & Dev. Disability 3 (2005)..... 19

Rani A. Desai et al., *Mental Health Care in Juvenile Detention Facilities: A Review*, 34 J. Am. Acad. Psych. & Law 204 (2006) 13, 20

Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891 (2004)..... 16, 17

James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414 (1985)..... 17

Seena Fazel et al., *Mental Disorders Among Adolescents in Juvenile Detention and Correctional Facilities: A Systematic Review and Metaregression Analysis of 25 Surveys*, 47 J. Am. Acad. Child Adolescent Psych. 1010 (2008) 9, 15

Barry C. Feld. *A Slower Form of Death: Implications of* Roper v. Simmons *for Juveniles Sentenced to Life Without Parole*, 22 ND J.L. Ethics & Pub Pol'y 9 (2008)..... 19

TABLE OF AUTHORITIES—continued

Page(s)

Christopher B. Forrest et al., *The Health Profile of Incarcerated Male Youths*, 105 Pediatrics 286 (2000) 9

Carolyn G. Grande, *Delinquency: The Learning Disabled Student's Reaction to Academic School Failure?*, 23 Adolescence 209 (1988) 11

Paul E. Greenbaum, *Service Use Among Adolescents With Comorbid Mental Health and Substance Use Disorders*, available at http://www.drugabuse.gov/meetings/childhood/Commissioned/Greenbaum/Greenbaum.pdf 20

Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 Calif. L. Rev. 1134 (1980) 17

Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 23 Law & Hum. Behav. 333 (2003) 15, 16, 17, 18

Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol'y & L. 3 (1997) 17, 19

Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-making Competence in Adolescents and Adults*, 22 J. Applied Dev. Psych. 257 (2001) 6

TABLE OF AUTHORITIES—continued

Page(s)

Lindsay M. Hayes, U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Suicide in Confinement: A National Survey* (2009) 20, 22

Human Rights Watch, *Thrown Away* (2005),available at http://www.hrw.org/reports/2005/us0205/us0205.pdf 21

Human Rights Watch, *When I Die, They'll Send Me Home: Youth Sentenced to Life without Parole in California* (2008), available at http://www.hrw.org/reports/2008/us0108/us0108web.pdf 19, 21

Illinois Coalition for the Fair Sentencing of Children, *Categorically Less Culpable: Children Sentenced to Life Without Possibility of Parole in Illinois* (2008), available at http://www.law.northwestern.edu/cfjc/jlwop/JLWOP_Report.pdf 21

Lisa H. Jaycox et al., *Mental Health and Medical Problems and Service Use Among Adolescent Substance Users*, 42 J. Am. Acad. Child Adolescent Psych. 701 (2003) 13

Matthew B. Johnson & Ronald C. Hunt, *The Psycholegal Interface in Juvenile Assessment of Miranda*, 18 Am. J. Forensic Psychol. 17 (2000) 17

TABLE OF AUTHORITIES—continued

Page(s)

Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths*, in *Youth on Trial: A Developmental Perspective on Juvenile Justice* (Thomas Grisso & Robert G. Schwartz eds., 2000) 7

Reed Larson et al., *Mood Variability and the Psychosocial Adjustment of Adolescents*, 9 J. Youth & Adolescence 469 (1980) 6

Peter E. Leone et al., *Understanding the Over Representation of Youths with Disabilities in Juvenile Detention*, 3 D.C.L. Rev. 389 (1995) 14

Daniel P. Mears & Laudan Y. Aron, Urban Institute Justice Policy Center, *Addressing The Needs of Youth With Disabilities in the Juvenile Justice System: The Current State of Knowledge* (2003) 11, 14

Candice L. Odgers et al., *Misdiagnosing the Problem: Mental Health Profiles of Incarcerated Juveniles*, 14 Can. Child Adolescent Psych. Rev. 26 (2005) 9, 10

Su-chin Serene Olin & Kimberly Hoagwood, *The Surgeon General's National Action Agenda on Children's Mental Health*, 4 Current Psych. Rpts. 101 (2002) 14

Joan Petersilia, California Policy Research Center Report Series, *Doing Justice? Criminal Offenders with Developmental Disabilities* (2000) 18, 19

TABLE OF AUTHORITIES—continued

Page(s)

Andres J. Pumariega et al., *Utilization of Mental Health Services in a Tri-Ethnic Sample of Adolescents*, 34 Cmty. Mental Health J. 145 (1998) 14

Mary M. Quinn et al., *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 Exceptional Children 339 (2005) 10, 11

Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 Law & Hum. Behav. 141 (2003) 17

Eileen P. Ryan & Richard E. Redding, *A Review of Mood Disorders Among Juvenile Offenders*, 55 Psych. Servs. 1397 (2004) 22

Jay A. Sevin et al., *Psychiatric Disorders in Adolescents with Developmental Disabilities: Longitudinal Data on Diagnostic Disagreement in 150 Clients*, 34 Child Psych. & Hum. Dev. 147 (2003) 12

Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in *Youth on Trial: A Developmental Perspective on Juvenile Justice* (Thomas Grisso & Robert G. Schwartz eds., 2000) 7

Deborah Shelton, *Emotional Disorders in Young Offenders*, 33 J. of Nursing Scholarship 259 (2001) 10

TABLE OF AUTHORITIES—continued

Page(s)

Jennie L. Shufelt & Joseph J. Cocozza, Nat'l Ctr. For Mental Health And Juvenile Justice, *Youth With Mental Health Disorders In The Juvenile Justice System: Results From A Multi-State Prevalence Study* (2006) 10, 13

Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 Archives Gen. Psych. 1133 (2002)..... 10

Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 Whittier J. Child & Fam. Advoc. 3 (2003)..... 14, 18, 19

Gail A. Wasserman et al., U.S. Dep't of Justice, Office of Justice Programs, Juvenile Justice Bulletin, *Assessing the Mental Health Status of Youth in Juvenile Justice Settings* (2004)..... 15

Jennifer Wood et al., *An Examination of the Relationships Between Violence Exposure, Posttraumatic Stress Symptomatology, and Delinquent Activity: An "Ecopathological" Model of Delinquent Behavior Among Incarcerated Adolescents*, 6 J. Aggression, Maltreatment & Trauma 127 (2002)..... 20

Tamara Zenz & George Langelett, *Special Education in Wisconsin's Juvenile Detention System*, 55 J. Corr. Educ. 60 (2004)..... 11

BRIEF OF DISABILITY RIGHTS LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS [1]

INTEREST OF THE *AMICUS CURIAE*

The Disability Rights Legal Center (DRLC) is a non-profit organization dedicated to promoting the rights of people with disabilities and to heightening public awareness of those rights by providing legal and related services. DRLC accomplishes its mission through many programs, including the Cancer Legal Resource Center (a joint program with Loyola Law School), the Education Advocacy Program, the Education and Outreach Program, and the Civil Rights Litigation Program. Since 1975, DRLC has handled countless disability rights cases under state and federal civil rights laws challenging discriminatory practices by government, business, and educational institutions.

DRLC has a particular interest in juvenile justice issues. DRLC provides legal advocacy to ensure that at-risk youth receive appropriate general and special education services in their community, thereby reducing the likelihood that they will one day become involved in the juvenile and adult justice systems. Because early intervention is far from comprehensive, a large proportion of youth who do become in-

---

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days before the due date of the intention of *amicus* to file this brief. The parties' letters consenting to the filing of this brief are filed with the Clerk's office.

volved in the juvenile delinquency system have undetected learning-related disabilities. DRLC's Juvenile Justice Section accordingly works to ensure that court-involved youth with special education needs receive appropriate education and related services. DRLC supports criminal justice policies that recognize the special needs of juveniles and the factors that uniquely affect their culpability. It therefore opposes the imposition of life-without-parole sentences on juveniles whose offenses were committed before the age of 18.

INTRODUCTION AND SUMMARY OF ARGUMENT

Sending children to prison for life without parole violates the Eighth Amendment because the practice is both cruel and unusual. It is grossly disproportionate to juvenile culpability, especially for non-homicidal crimes like those at issue here. It is exceptionally unusual in modern society. And it is unusually cruel in light of the offender's extreme youth, which more often than not is accompanied by a developmental disability.

A juvenile sentence of life without parole is as final and irrevocable as a juvenile death sentence. It condemns the juvenile to die in prison as surely as a death sentence; under both sentences the juvenile enters prison as a shackled teenager and decades later leaves in a pine box. The sole difference is that in life without parole the State awaits the death, rather than inflicts it. But a sentence of life without parole, just as certainly as a death sentence, forecloses any prospect of personal rehabilitation or societal reentry, and accordingly should be reserved for the very worst of offenders, those whose prior culpability is unquestionable and whose future rehabilita-

tion inconceivable. The same considerations that led this Court to find juvenile executions unconstitutional in *Roper* v. *Simmons*, 543 U.S. 551 (2005), and *Thompson* v. *Oklahoma*, 487 U.S. 815 (1988), render the sentence here beyond the scope permitted by the Eighth Amendment.

Although children should be held accountable for their crimes, it does not follow that they should be punished identically to adults. Society has long distinguished among the rights, privileges, and burdens of adults and children. See Br. for Pet. in No. 08-7621, App. A. Children are not miniature adults but rather are fundamentally different. They are more impulsive and less able to assess the risks and consequences of their actions. Moreover, because children are not neurologically complete, they are far less likely to be truly hardened criminals. Thus, children have a greater potential for rehabilitation. The constitutional limits on their punishment should reflect those inherent differences.

This brief explains how juveniles' special susceptibility to emotional, psychological, and learning-related disabilities affects the constitutional limits on their sentencing. Juveniles with serious emotional, psychiatric, and learning-related brain disabilities are significantly overrepresented in the incarcerated population. Juveniles suffering from serious disabilities, moreover, are likely to be particularly disadvantaged at every stage of their dealings with the criminal justice system. When their disabilities are unrecognized, as is often the case, these problems intensify. The cases before this Court are illustrative—both Graham (in No. 08-7412) and Sullivan (in No. 08-7621) have substantial disabilities, yet there is no evidence that their disabilities re-

ceived any consideration at sentencing. And the disproportionality of a sentence of life without parole is especially pronounced for juveniles with disabilities, given the realities of long-term incarceration in facilities where harsh and austere conditions purposely tax the most hardened adult inmate; those same conditions aggravate existing juvenile deficits.

The high frequency of disabilities in juveniles involved in the criminal justice system further impedes the reliable assessment of juvenile culpability. Consequently, any irrevocable assessment of culpability is necessarily unsound and a lifelong sentence unconstitutionally excessive. The discredited notion that juveniles are merely adults in training and thus should be subject to the same punishment should be laid to rest. As this Court has recognized, juveniles, and especially juveniles with diminished capacities, present different issues of culpability entirely. Because the nature and the assessment of juvenile culpability make final and irrevocable judgments irrational, a sentence to a juvenile of life without parole for a non-homicidal offense exceeds constitutional limits in the same way as a death sentence for a juvenile who commits a homicide.

ARGUMENT

A wealth of psychosocial and neurological research shows that juveniles differ from adults in numerous ways that reduce their moral culpability. These developmental limitations and deficiencies are magnified when disability is a factor. It is therefore unsurprising that juveniles with disabilities are overrepresented (and fare especially poorly) in the criminal justice system. This fact illuminates the fundamentally mistaken assumption about juvenile culpability that underlies juvenile sentences of life

without parole: namely, that it is possible to conclude that a juvenile—in these cases a 17-year-old and a 13-year-old, in another perhaps a 10-year-old—is wholly unredeemable and should, for that reason, be permanently banished from free society.[2] To the contrary, the defining characteristic of juvenile personality is its transience. All juveniles mature, and the control that comes with maturity can check the transgressive influences of disability—influences that are particularly pronounced on the still-forming juvenile psyche. A sentence of life without parole presumes irreparable corruption when in fact juvenile offenders are immature, often have disabilities, act impulsively, and—above all—are still in the process of growing into the adults they eventually will become. For that reason, this Court observed, "it is likely cruel, and certainly unusual, to impose on a child a punishment that takes as its predicate the existence of a fully rational, choosing agent." *Thompson* v. *Oklahoma*, 487 U.S. 815, 825 n.23 (1988) (plurality op.). A punishment that imprisons a juvenile until death rests on an equally unsound premise, and therefore is unconstitutionally disproportionate.

As this Court repeatedly has acknowledged, even normal children are less culpable for their actions than adults and therefore less deserving of the most severe criminal punishments. The presence of a disability further reduces the blameworthiness of juvenile offenders. And the very nature of a disability often impairs the evaluation of a juvenile's moral cul-

---

[2] Children as young as 10 or still younger are at risk from the sentencing practice challenged here. Under Florida law, a "child of *any age* who is charged with" a major crime may be "*tried and handled in every respect as an adult.*" Fla. Stat. Ann. § 985.56(1) (emphasis added.)

pability. Thus, the extraordinarily high prevalence of disability—both recognized and undiagnosed—among juvenile offenders is an additional reason that a sentence of life without parole is categorically disproportionate for any juvenile.

A. Life Without Parole Is An Unconstitutionally Disproportionate Punishment Because Juveniles Are Less Morally Culpable.

As this Court recognized over a quarter-century ago, "[e]ven the normal 16-year-old customarily lacks the maturity of an adult." *Eddings* v. *Oklahoma*, 455 U.S. 104, 116 (1982). More recently, in *Roper* v. *Simmons*, 543 U.S. 551 (2005), the Court identified three broad differences between juveniles and adults that preclude the constitutional application of the death penalty to minors. These differences—each supported by substantial research—render equally unconstitutional the imposition of sentences of life without parole for non-homicidal offenses.

First, juveniles do not have the same capacity as adults for mature reasoning, risk assessment and impulse control; therefore, "impetuous and ill-considered actions and decisions" are "more understandable among the young." *Roper*, 543 U.S. at 569 (internal quotation marks omitted).[3] Second, "juve-

---

[3] See, *e.g.*, *Thompson* v. *Oklahoma*, 487 U.S. 815, 835 (1988) (plurality op.); Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-making Competence in Adolescents and Adults*, 22 J. Applied Dev. Psych. 257, 264-270 (2001); Reed Larson et al., *Mood Variability and the Psychosocial Adjustment of Adolescents*, 9 J. Youth & Adolescence 469, 488 (1980).

niles are more vulnerable or susceptible to negative influences and outside pressures. * * * This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment."[4] *Ibid.* Finally, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."[5] *Id.* at 570.

These categorical developmental deficits combine to "render suspect any conclusion that a juvenile falls among the worst," or most morally culpable of offenders. *Roper*, 543 U.S. at 570. For that reason, the consensus of modern society has rejected imposition of a sentence of life without parole on a juvenile, as the briefs for the petitioners explain. Accordingly, for the reasons more fully explained in those briefs and in the briefs of other *amici* supporting the petition-

---

The remarks at sentencing in No. 08-7412, *Graham* v. *Florida*, reflect a contrary understanding of juveniles' developmental characteristics. In the court's view, Graham had "*decided*" that an "escalating pattern of criminal conduct" was "how [he was] going to lead [his] life" and remarked that it was "unfortunate that [he] made that *choice*." No. 08-7412, J.A. 394 (emphasis added). By contrast, as noted above (at p. 5), this Court rejected the notion that a juvenile sentence may be constitutionally predicated on the notion of "a fully rational, choosing agent." *Thompson*, 487 U.S. at 825 n.23.

[4] See, *e.g.*, *Lee* v. *Weisman*, 505 U.S. 577, 593 (1992); *Thompson*, 487 U.S. at 835; Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths*, in *Youth on Trial: A Developmental Perspective on Juvenile Justice* 33, 47-48 (Thomas Grisso & Robert G. Schwartz eds., 2000).

[5] See, *e.g.*, Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in *Youth on Trial: A Developmental Perspective on Juvenile Justice* 9, 27 (Thomas Grisso & Robert G. Schwartz eds., 2000).

ers, such sentences are grossly disproportionate and therefore unconstitutional.

B. The High Prevalence Of Disabilities Among Juvenile Offenders Makes Judicial Assessment Of Their Culpability Insufficiently Reliable To Support Irrevocable Punishment.

The interplay among youth, disability, and delinquency underscores why juvenile life-without-parole sentences cannot withstand *Roper's* constitutional test. The high prevalence of disabilities among the delinquent youth population means that a large number of juveniles facing life without parole will have a disability.[6] Yet juveniles with disabilities are disadvantaged at every stage of their encounters with the criminal justice system. Indeed, disability often goes unrecognized, making it impossible to adequately consider its effect on the already reduced moral culpability of juveniles. Coupled with the inherent unreliability of judgments about juvenile culpability—which, as *Roper* recognized, stems from the fact that juvenile character is a work in progress—the distorting effect of widespread disability makes it inappropriate to sentence a juvenile to imprisonment until death.

---

[6] For example, Graham, the petitioner in No. 08-7412, "most likely suffered a form of crack addiction at birth" (both parents were long-term crack addicts), No. 08-7412, J.A. 448, had long-term depression, *id.* at 446, 448, and suffered from ADHD, for which his mother refused the prescribed treatment. *id.* at 447. Sullivan, the petitioner in No. 08-7621, has a mental disability and, at age 13, read at a first-grade level. See No. 08-7621, J.A. 26 & Pet. Reply 7.

"[T]he signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Roper*, 543 U.S. at 570 (internal quotation marks omitted). A sentence of life without parole irrevocably presumes the contrary, even though experience and science show that the volatile mix of youth and disability responsible for so much delinquent behavior among juveniles will fade in the fullness of time.

1. Juveniles With Disabilities Are Disproportionately Affected By The Criminal Justice System.

Incarcerated youth are significantly more likely to have a mental disorder than the general population of teens.[7] "[T]he general consensus" is that between 70 and 100 percent of "incarcerated youth meet [the] formal [diagnostic] criteria for at least one * * * disorder," with "approximately 20% of youth meeting diagnostic criteria for a serious mental health disorder—defined as serious emotional disturbance resulting in functional impairment." Candice L. Odgers et al., *Misdiagnosing the Problem: Mental Health Profiles of Incarcerated Juveniles*, 14 Can. Child Adolescent Psych. Rev. 26, 27 (2005). By comparison, the prevalence of *any* disorder in the general youth population is approximately 1 in 3,

---

[7] See Seena Fazel et al., *Mental Disorders Among Adolescents in Juvenile Detention and Correctional Facilities: A Systematic Review and Metaregression Analysis of 25 Surveys*, 47 J. Am. Acad. Child Adolescent Psych. 1010, 1016 (2008) (youth in prison are between 2 to 20 times more likely to have mental disorders than age-equivalent youth in the general population); Christopher B. Forrest et al., *The Health Profile of Incarcerated Male Youths*, 105 Pediatrics 286, 289 (2000).

with only 1 in 10 youth meeting the criteria for a serious one. *Ibid.*

Three recent studies across five States provide compelling evidence of the high rate of mental disabilities among juveniles in the criminal justice system. Nearly 60% of male youths arrested in Cook County, Illinois, and over two-thirds of the females, met the diagnostic criteria for a psychiatric disorder. Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 Archives Gen. Psych. 1133, 1137 (2002). Similar figures were reported in a study of over 1,400 youthful offenders from Louisiana, Texas, and Washington. Jennie L. Shufelt & Joseph J. Cocozza, Nat'l Ctr. For Mental Health And Juvenile Justice, *Youth With Mental Health Disorders In The Juvenile Justice System: Results From A Multi-State Prevalence Study* 2 (2006) (over 70%). And a study of incarcerated juveniles in Maryland found that more than half met the diagnostic criteria for a psychiatric disorder. Deborah Shelton, *Emotional Disorders in Young Offenders*, 33 J. of Nursing Scholarship 259, 262 (2001). Put simply, youth detained in "correctional facilities have levels of psychopathology similar to the levels of mental illness found in psychiatric hospitals." *Id.* at 259. Moreover, the youngest juvenile offenders—those, like Sullivan, between the ages of 12 and 14—who met the diagnostic criteria for more than one disability had "significantly more serious criminal behavior," underscoring the synergistic effects of disability and pronounced immaturity. *Id.* at 261.

There is a likewise strong relation between juvenile incarceration and learning-related disabilities, which are relatively common in the imprisoned juvenile population. See Mary M. Quinn et al., *Youth*

with Disabilities in Juvenile Corrections: A National Survey, 71 Exceptional Children 339, 342 (2005). Learning disabilities predispose youth toward involvement in the criminal justice system.[8]

"[S]tudies typically suggest that approximately 10 percent of general population youth have a special education disability, compared with between 30 and 50 percent of incarcerated youth." Daniel P. Mears & Laudan Y. Aron, Urban Institute Justice Policy Center, *Addressing The Needs of Youth With Disabilities in the Juvenile Justice System: The Current State of Knowledge* § 5.3 (2003). One national study found that during the 2000-2001 school year, 33.4% of students in juvenile correction institutions received special education services compared to 8.8% of students in the general population. Quinn, *supra*, 71 Exceptional Children at 342.[9] Other studies have found disparities of more than five to one. See Tamara Zenz

---

[8] The link between academic underachievement and delinquency is firmly established. See, *e.g.*, Norman Brier, *The Relationship Between Learning Disability and Delinquency: A Review and Reappraisal*, 22 J. Learning Disabilities 546, 546 (1989); Carolyn G. Grande, *Delinquency: The Learning Disabled Student's Reaction to Academic School Failure?*, 23 Adolescence 209, 212 (1988); see generally ABA Juvenile Justice Center, *Special Ed Kids In The Justice System: How To Recognize and Treat Young People with Disabilities that Compromise Their Ability To Comprehend, Learn, and Behave* 2 (Lourdes M. Rosado ed., 2000) (estimating that 18% of those with an intellectual disability, 31% of those with a specific learning disability, and 57% of youth with a behavioral disorder will be arrested within five years of leaving high school).

[9] These figures likely understate the actual prevalence of learning disabilities because they reflect only those individuals already diagnosed with a disability and being provided with services or treatment. *Ibid.*

& George Langelett, *Special Education in Wisconsin's Juvenile Detention System*, 55 J. Corr. Educ. 60, 63 (2004) (61% of juveniles incarcerated in Wisconsin received special education services, compared to 11.77% of the students in the public school system).

2. Sporadic Recognition Of Juvenile Disability Further Impedes The Reliable Assessment Of Juvenile Culpability.

Because of their developmental characteristics, the culpability of juveniles never rises to the level that would justify a life-without-parole sentence. But even if an exceedingly "rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity" (*Roper*, 543 U.S. at 572), to deserve such a harsh sentence, the confounding facts of youth make the reliable identification of such exceptional offenders impossible. As this Court has recognized, the professional norms of psychiatrists forbid them from diagnosing any patients under 18 with antisocial personality disorder, because even experienced mental health professionals find it difficult to distinguish between "unfortunate yet transient immaturity" and "irreparable corruption" in juveniles. *Id.* at 573. A lay judge or lay jury cannot be expected to do better, and cannot constitutionally be entrusted with that task when the stakes place a child's life beyond redemption.

The difficulty of accurately diagnosing mental and psychiatric disorders in juveniles further precludes the constitutional imposition of an immutable punishment. Diagnosing mental disabilities in juveniles is difficult even for mental health professionals. See, *e.g.*, Jay A. Sevin et al., *Psychiatric Disorders in Adolescents with Developmental Disabilities: Longi-*

tudinal Data on Diagnostic Disagreement in 150 Clients, 34 Child Psych. & Hum. Dev. 147, 161 (2003) (over a 10 year period, the individuals studied received an average of 5 different diagnoses and 7 different medications). The broad variability of symptoms is unsurprising, "given that the disorder is superimposed on a developing child that has yet to achieve emotional, cognitive, neuropsychological, and physical maturity." Margaret A. Bowring & Maria Kovacs, *Difficulties in Diagnosing Manic Disorders Among Children and Adolescents*, 31 J. Am. Acad. Child. Adolescent Psych. 611, 612 (1992). In addition, "the high rate of comorbidity across psychiatric diagnoses" in juveniles "poses a particularly difficult problem" for diagnosis. Rani A. Desai et al., *Mental Health Care in Juvenile Detention Facilities: A Review*, 34 J. Am. Acad. Psych. & Law 204, 206 (2006); see also Gabrielle A. Carlson, *The Challenge of Diagnosing Depression in Childhood and Adolescence*, 61 J. Affective Disorders 3, 3, 5 (2000).[10]

---

[10] Juvenile disabilities have high comorbidity, meaning that the majority of youth who met the diagnostic criteria for one mental health disorder also met the criteria for other, distinct, mental health disorders. Shufelt & Cocozza, *supra*, *Youth With Mental Health Disorders* at 3 (79% of juveniles with at least one disorder met the criteria for two or more disorders, and over 60% of juveniles with at least one disorder were diagnosed with three or more). Mental health disorders are also highly correlated with substance abuse disorders. *Ibid.* (among youth with a mental health disorder, 61% met the criteria for a substance use disorder); see also Lisa H. Jaycox et al., *Mental Health and Medical Problems and Service Use Among Adolescent Substance Users*, 42 J. Am. Acad. Child Adolescent Psych. 701, 701 (2003) (almost two-thirds of sample in substance abuse program had at least one comorbid mental health disorder).

Undiagnosed disabilities are substantially likely to remain undiagnosed throughout a juvenile's tenure in the criminal justice system. To begin with, in many cases, the educational system—the first line of defense in identifying many juvenile disabilities—has already failed in that task. Su-chin Serene Olin & Kimberly Hoagwood, *The Surgeon General's National Action Agenda on Children's Mental Health*, 4 Current Psych. Rpts. 101, 102-103 (2002); cf. 20 U.S.C. § 1412(a)(3) (requiring, pursuant to the Individuals with Disabilities Education Act, that every State "identif[y], locate[], and evaluate[]" all "children with disabilities residing in the State").[11] Second, minority youth and youth of low socioeconomic status (who are at greater risk of involvement with the justice system) are more likely to have unmet mental health needs. Andres J. Pumariega et al., *Utilization of Mental Health Services in a Tri-Ethnic Sample of Adolescents*, 34 Cmty. Mental Health J. 145, 146-147, 155 (1998). Third, "transfer of school records to juvenile court and correctional facilities" is "inconsistent to nominal," making it easy for juveniles with disabilities to fall through the cracks. Mears & Aron, *supra*, § 5.3; Peter E. Leone et al., *Understanding the Over Representation of Youths with Disabilities in Juvenile Detention*, 3 D.C.L. Rev. 389, 397 (1995). Fourth, even though intake screen-

---

[11] See also Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 Whittier J. Child & Fam. Advoc. 3, 29-33 (2003) (recalling how "Dale," despite failing kindergarten and first, second, and third grades, was never referred for evaluation until he was 15 and facing an armed assault charge, at which point he was diagnosed with mild mental retardation and a severe emotional disturbance).

ing procedures have improved, "assessment practices in juvenile justice settings remain highly variable and generally have not used evidence-based, scientifically sound instruments." Gail A. Wasserman et al., U.S. Dep't of Justice, Office of Justice Programs, Juvenile Justice Bulletin, *Assessing the Mental Health Status of Youth in Juvenile Justice Settings* 1 (2004).

All in all, it is unsurprising that a "[h]igh prevalence of both undiagnosed and untreated physical and mental health problems have been reported" for incarcerated juveniles. Seena Fazel et al., *Mental Disorders Among Adolescents in Juvenile Detention and Correctional Facilities: A Systematic Review and Metaregression Analysis of 25 Surveys*, 47 J. Am. Acad. Child Adolescent Psych. 1010, 1010 (2008). The prevalence of undiagnosed disability among juveniles casts additional doubt on the criminal justice system's ability to reliably assess juvenile culpability. Only a categorical rule precluding the imposition of life-without-parole sentences on juveniles can acceptably contain the risk of permanently and disproportionately punishing juveniles with limited culpability.

3. Juveniles With Disabilities Are Systematically Disadvantaged In Their Dealings With The Criminal Justice System.

Juveniles face distinctive challenges in the criminal justice system. Among juvenile offenders, "approximately one third of 11- to 13-year olds, and * * * one fifth of 14- to 15-year olds are" so "impaired in capacities relevant to adjudicative competence" that, if they were adults, they "would likely be considered incompetent to stand trial." Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison*

of Adolescents' and Adults' Capacities as Trial Defendants, 23 Law & Hum. Behav. 333, 356 (2003). Even juveniles who are technically competent to stand trial, however, are at a disadvantage on account of the diminished decision-making abilities characteristic to youth. See *Roper*, 543 U.S. at 569.

The high prevalence of disabilities among delinquent juveniles makes these problems worse. Setting aside the diminished moral culpability of juveniles as a class, there is a real risk that sentences of life without parole are not limited to only the "worst" juvenile offenders. Juveniles with disabilities are at a significant disadvantage at every stage of the criminal justice system. See *Roper*, 543 U.S. at 569. In holding that the death penalty could not constitutionally be imposed on defendants with mental retardation, this Court noted the increased "possibility of false confessions" by individuals with intellectual disabilities, and observed that those persons:

> may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crime.

Atkins v. *Virginia*, 536 U.S. 304, 320-321 (2002). The same problems impair adjudication of the youth offender with disabilities. The effects of youth operate in synergy with the effects of disability, leaving juveniles with disabilities critically vulnerable at every stage of the criminal justice system: interrogation and arrest, trial, and sentencing.

Juveniles generally are more prone than adults to false confessions. See Grisso, *supra*, 23 Law & Hum. Behav. at 357; Steven A. Drizin & Richard A.

Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 1005 (2004). That is because juveniles are both more compliant and more suggestible in the face of pressure by perceived authority figures.[12] The problem of false confessions not only affects the likelihood of inappropriate guilty pleas, but also increases the risk of wrongful convictions at trial, which necessarily results in a disproportionate sentence.[13] Grisso, *supra*, 23 Law & Hum. Behav. at 357. And juveniles with disabilities may be even more susceptible to making false confessions. See James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants,* 53 Geo. Wash. L. Rev. 414, 446 (1985).

Similarly, when even "normal" juveniles have difficulty comprehending the *Miranda* warnings, see Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 Calif. L. Rev. 1134, 1160 (1980), "[a] child with demonstrable language-based disabilities typically cannot under-

---

[12] Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 Law & Hum. Behav. 141, 151 (2003); Matthew B. Johnson & Ronald C. Hunt, *The Psycholegal Interface in Juvenile Assessment of Miranda*, 18 Am. J. Forensic Psychol. 17, 24 (2000); Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol'y & L. 3, 16 (1997).

[13] It is therefore unsurprising that adolescents make up a large proportion of the known cases of false confessors. In a survey of 125 defendants found guilty on the basis of a false confession and later exonerated, the authors found that fully *one-third* were juveniles. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 944 (2004).

stand the *Miranda* warnings * * *" at all.[14] See Tulman, *supra*, 3 Whittier J. Child & Fam. Advoc. at 46).[15]

These comparative disadvantages persist into the trial phase. In a series of simulated vignettes based on decisions commonly encountered in the criminal justice system, like "disclosing information during consultation with a defense attorney" or "responding to a plea agreement for reduced consequences in exchange for a guilty plea and testimony against other defendants," younger juveniles systematically made worse choices than their older counterparts.[16] Grisso, *supra*, 23 Law & Hum. Be-

---

[14] At 13, Sullivan read at a first-grade level (No. 08-7621, Pet. Reply 7), whereas "[t]he *Miranda* warning itself has been evaluated to be at a 7th grade level of reading and listening difficulty." Joan Petersilia, California Policy Research Center Report Series, *Doing Justice? Criminal Offenders with Developmental Disabilities* at 13 (2000).

[15] The underdiagnosis of disability in juvenile defendants can also result in overlooked defenses. For example, a juvenile's disability "may be relevant to * * * establishing a *Miranda* violation by police." Tulman, *supra*, 3 Whittier J. Child & Fam. Advoc. at 44.

[16] Juveniles must rely on counsel to safeguard their interests (see *In re Gault*, 387 U.S. 1, 38 n.65 (1967)), a faith that is unfortunately often misplaced. Sullivan's trial lasted a single day. No. 08-7621, J.A. 4-5. Based largely on testimony from his older co-defendants and a suggestive voice identification by the victim that trial counsel did not effectively challenge—but no visual identification, physical, or DNA evidence (indeed, the DNA material was destroyed by the State in 1993)—Sullivan was convicted of sexual assault. *Id.* at 24, 26; *id.* Pet. Reply 6 & n.3. Trial counsel filed no written pleadings following Sullivan's conviction, and his remarks at sentencing fill less than a page of transcript. Sullivan's appointed appellate counsel filed an *Anders* [v. *California*, 386 U.S. 738 (1967)] brief indicating his

hav. at 340, 351-352. Juveniles with disabilities are even less able to participate in and make effective decisions regarding their own defenses. See Tulman, *supra*, 3 Whittier J. Child & Fam. Advoc. at 49-51; Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol'y & L. 3, 13-14 (1997).

Finally, evidence suggests that trial judges perversely have come to treat youth or disability as an *aggravating* factor in determining punishment. Thus, youths convicted of murder are more likely than adults convicted of murder to be sentenced to prison for life without the possibility of parole. See Barry C. Feld. *A Slower Form of Death: Implications of* Roper v. Simmons *for Juveniles Sentenced to Life Without Parole*, 22 ND J.L. Ethics & Pub Pol'y 9, 52-53 (2008); Human Rights Watch, *When I Die, They'll Send Me Home: Youth Sentenced to Life without Parole in California* 36 (2008), available at http://www.hrw.org/reports/2008/us0108/us0108web.pdf ("Respondents reported that in 56 percent of cases in which there was an adult codefendant, the adult received a lower sentence than the juvenile."). Individuals with disabilities also tend to receive more severe punishments for the offenses they commit. Judith Cockram, *Justice or Differential Treatment? Sentencing of Offenders with an Intellectual Disability*, 30 J. Intell. & Dev. Disability 3, 9 (2005); Petersilia, *supra*, *Doing Justice?* at 23. That underscores the disproportionality of a life-without-parole sentence for a juvenile who might well be treated better if he were an adult.

---

view that there was not a single colorable issue to be raised in the appeal of a 13-year-old child sentenced to die in prison. No. 08-7621, Pet. 6; *id.* Pet. Reply 6-7.

C. The Presence Of Disability Exacerbates The Unconstitutional Disproportionality Of Juvenile Life-Without-Parole Sentences.

Imprisoning any child for the rest of his or her life without any possibility of release violates the Eighth Amendment's proportionality standard. Because of their special needs and vulnerabilities, juveniles with disabilities serving life-without-parole terms face atypical and significant hardships on top of those suffered by juveniles generally.

First, the quality of mental health services provided to youth confined in correctional facilities is poor. Desai, *supra*, 34 J. Am. Acad. Psych. & Law at 208-209. Almost 20% of the nation's facilities do not have procedures in place for administration of psychotropic medication. Lindsay M. Hayes, U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Suicide in Confinement: A National Survey* 4 (2009). Over 30% of facilities lacked onsite access to psychiatrists, psychologists, or master's degree-level social workers. *Ibid.* In Virginia, 8-10% of the youth in that system had serious mental health problems requiring immediate attention; of those, only 14% received any mental health services. Jennifer Wood et al., *An Examination of the Relationships Between Violence Exposure, Posttraumatic Stress Symptomatology, and Delinquent Activity: An "Ecopathological" Model of Delinquent Behavior Among Incarcerated Adolescents*, 6 J. Aggression, Maltreatment & Trauma 127, 129 (2002).[17]

---

[17] Likewise, less than half of all juveniles who could have benefited from alcohol and drug counseling services actually received them. Paul E. Greenbaum, *Service Use Among Adoles-*

The disparity between the needs of incarcerated juveniles and the available services extends to educational and other programs. Many juveniles serving life-without-parole sentences lack access to services because prisoners who may someday be released are typically given priority.[18] These deficiencies may well violate States' affirmative obligation under the Individuals with Disabilities Education Act to provide all juveniles with disabilities with appropriate special education and support services, whether or not they are incarcerated. See 20 U.S.C. § 1412(a)(1)(A), (a)(11)(C); *Green* v. *Johnson*, 513 F. Supp. 965, 976 (D. Mass. 1981).

---

cents With Comorbid Mental Health and Substance Use Disorders 7 (commissioned for the National Institute on Drug Abuse's May 2000 on Assessing the Impact of Childhood Interventions on Subsequent Drug Use), available at http://www.drugabuse.gov/meetings/childhood/Commissioned/Greenbaum/Greenbaum.pdf; see *supra* note 10.

[18] See, *e.g.*, Illinois Coalition for the Fair Sentencing of Children, *Categorically Less Culpable: Children Sentenced to Life Without Possibility of Parole in Illinois* 21 (2008), available at http://www.law.northwestern.edu/cfjc/jlwop/JLWOP_Report.pdf ("[Educational] programs often were, and are, expressly denied to those serving life without parole sentences. * * * The prison policy gives enrollment preference to those with less time to serve * * *."); Human Rights Watch, *When I Die, They'll Send Me Home: Youth Sentenced to Life without Parole in California* 56-57 (2008), available at http://www.hrw.org/reports/2008/us0108/us0108web.pdf ("[P]rison practice and regulations give persons sentenced to life without parole the lowest priority for accessing programs."); Human Rights Watch, *Thrown Away* 32-33 (2005), available at http://www.hrw.org/reports/2005/us0205/us0205.pdf ("[C]hild offender[s] sentenced to life without parole * * * are not able to access the same variety of classes as individuals who will be released from prison at some point in the future.").

Moreover, even apart from the failure of the criminal justice system to meet the special needs of juveniles with disabilities, the more routine perils of confinement weigh especially heavily on them. Confinement itself aggravates the conditions of juveniles with disabilities. For example, "[i]ncarceration may precipitate major depression among vulnerable individuals." Eileen P. Ryan & Richard E. Redding, *A Review of Mood Disorders Among Juvenile Offenders*, 55 Psych. Servs. 1397, 1399 (2004). "[I]f all youth are to some degree at risk for suicide, juveniles in confinement may be at greater risk because they have life histories that predispose them to suicide," such as histories of mental health disorders and substance abuse. Hayes, *supra*, *Juvenile Suicide in Confinement: A National Survey* at 1-2.

* * *

As the Court recognized in a related context, the deficiencies of individuals who have "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others"—a description that aptly characterizes juvenile defendants generally, and juveniles with disabilities particularly—"do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability." *Atkins*, 536 U.S. at 318. The diminished culpability of juveniles categorically precludes subjecting them to the punishment of life without parole. Even a very serious crime committed by a juvenile is far from reliable evidence of irretrievably depraved character—a circumstance of heightened constitutional significance in light of the

prevalence and documented effects of juvenile disability.

CONCLUSION

The judgments of the Florida District Court of Appeal should be reversed.

Respectfully submitted.

Paula D. Pearlman
Carly J. Munson
Disability Rights Legal Center
919 Albany St.
Los Angeles, CA 90015
(213) 736-1031

Neil M. Soltman
Counsel of Record
Mayer Brown LLP
350 South Grand Ave.
Los Angeles, CA 90071
(213) 229-9500

Donald M. Falk
Mayer Brown LLP
Two Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306
(650) 331-2000

Brian J. Wong
Mayer Brown LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

Counsel for Amicus Curiae Disability Rights Legal Center

July 2009

AMICUS CURIAE BRIEF

134 (5) (17)

Nos. 08-7412 & 08-7621

Supreme Court, U.S.
FILED
JUL 23 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writs Of Certiorari To The District Court Of Appeal, First District, State Of Florida

BRIEF OF *AMICI CURIAE* EDUCATORS IN SUPPORT OF PETITIONERS

JOHN J. GIBBONS
Counsel of Record
LAWRENCE S. LUSTBERG
AVIDAN Y. COVER
JENNIFER B. CONDON
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102
(973) 596-4500

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF *AMICI* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

THE WORK OF EDUCATORS DEMONSTRATES THAT BECAUSE JUVENILES ARE UNFORMED AND HAVE AN INHERENT CAPACITY FOR POSITIVE GROWTH AND REHABILITATION, LIFE WITHOUT PAROLE SENTENCES, WHICH WHOLLY DISREGARD THESE UNIQUE CHARACTERISTICS OF YOUTH, ARE EXCESSIVE, CRUEL AND UNUSUAL IN VIOLATION OF THE EIGHTH AMENDMENT 4

A. Education Theory And Practice Have Long Recognized The Dynamic, Transient Nature Of Youth 6

B. Educators Recognize That Children Are Particularly Susceptible To Negative Influences And Societal Harms, Including Poverty, Violence, Addiction, And Peer Pressure 11

C. The Success Of Educators Serving At-Risk Juveniles Demonstrates That All Juveniles Have A Unique Capacity For Transformation 14

TABLE OF CONTENTS – Continued

Page

D. Life Without Parole Sentences For Juveniles Are Contrary To Civilized Standards Of Decency 30

CONCLUSION 33

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Atkins v. Virginia, 536 U.S. 304 (2002) 5, 10, 30

Grutter v. Bollinger, 539 U.S. 306 (2003) 32

Johnson v. Texas, 509 U.S. 350 (1993).....29

Kennedy v. Louisiana, 128 S.Ct. 2641 (2008) 5, 29, 30

Plyler v. Doe, 457 U.S. 202 (1982).....32

Roper v. Simmons, 543 U.S. 551 (2005).....*passim*

Stanford v. Kentucky, 492 U.S. 361 (1989).....14

Thompson v. Oklahoma, 487 U.S. 815 (1988).....6, 10, 30

Trop v. Dulles, 356 U.S. 86 (1958).....5

Wisconsin v. Yoder, 406 U.S. 205 (1972) 7

STATUTES

20 U.S.C. § 6421(b).....17

20 U.S.C. § 6472(2).....1

OTHER AUTHORITIES

Laudan Y. Aron, *An Overview of Alternative Education* (The Urban Institute), Jan. 2006 .....16, 21

TABLE OF AUTHORITIES – Continued

Page

Brian J. Bigelow, *There's an Elephant in the Room: The Impact of Early Poverty and Neglect on Intelligence and Common Learning Disorders in Children, Adolescents, and Their Parents*, 34 Developmental Disabilities Bulletin 177 (2006) 11, 12

Jerome Bruner, *The Process of Education* (1960) 7

Geoffrey Canada, *fist stick knife gun: A Personal History of Violence in America* (1995) 21

B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 Biological Psychiatry 241 (2000) 8

John Dewey, *Experience and Education* (1938) 7, 11

The Door, *The Door 2008 Annual Report* (2003) 26, 27

Angela L. Duckworth & Martin E.P. Seligman, *Self-Discipline Outdoes IQ in Predicting Academic Performance of Adolescents*, 16 Psychological Sci. 939 (2005) 23

Mark Dynarski & Philip Gleason, *How Can We Help? What We Have Learned from Evaluations of Federal Dropout-Prevention Programs* (1998) 16, 20, 21, 22

Gary W. Evans, *The Environment of Childhood Poverty*, 59 Am. Psychologist 88 (2004) 11, 12

TABLE OF AUTHORITIES – Continued

Page

James Forman, Jr., *Out of Jail and Into Jobs*, 8 Educ. Next 44 (Fall 2008) ..... *passim*

Mark T. Greenberg et al., *Enhancing School-Based Prevention and Youth Development Through Coordinated Social, Emotional, and Academic Learning*, 58 Am. Psychologist 466 (2003) 8

Usha Goswami, *Neuroscience and Education*, 74 Brit. J. Educ. Psychol. 1 (2004) 8, 9

J.D. Hoye & Chris Sturgis, *The Alternative Pathways Project: A Framework for Dropout Reduction and Recovery* 5 (June 2005) 19, 20

Sarah Ingersoll & Donni LeBoeuf, *Reaching Out to Youth Out of the Education Mainstream*, Juvenile Justice Bull. (U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention), Feb. 1997 ..... 16, 22, 25

Juvenile Detention Alternatives Initiative, *Detention Reform: An Effective Public Safety Strategy* 4 (2007) 29

Lawrence Kohlberg & Rochelle Mayer, *Development as the Aim of Education*, 42 Harv. Educ. Rev. 449 (1972) 7

Deanna Kuhn, *Do Cognitive Changes Accompany Development in the Adolescent Brain?* 1 Persp. Psychol. Sci. 59 (2006) 9

TABLE OF AUTHORITIES – Continued

Page

Cheryl M. Lange & Sandra J. Sletten, *Alternative Education: A Brief History and Research Synthesis*, Project FORUM (National Association of State Directors of Special Education), 2002 .....16, 17, 20, 21

Peter E. Leone et al., *School Failure, Race, and Disability: Promoting Positive Outcomes, Decreasing Vulnerability for Involvement with the Juvenile Delinquency System* (The National Center on Education, Disability, and Juvenile Justice), Oct. 2003.....23

Little Hoover Commission, *Never Too Early, Never Too Late: To Prevent Youth Crime and Violence* (June 2001) 18

Nancy Martin & Samuel Halperin, *Whatever It Takes: How Twelve Communities Are Reconnecting Out-of-School Youth* (American Youth Policy Forum), 2006 25

National Research Council, Commission on Behavioral and Social Sciences and Education, *Losing Generations: Adolescents in High-Risk Settings* 102-03 (1993).....16

Mike Rose, *Possible Lives: The Promise of Public Education in America* 432 (1995) 23

Jodie L. Roth & Jeanne Brooks-Gunn, *Academic Success, Adolescence*, in *Encyclopedia of Primary Prevention and Health Promotion* 140 (Thomas P. Gullotta & Martin Bloom eds., 2003).....19, 22

TABLE OF AUTHORITIES – Continued

Page

Betsy Brown Ruzzi & Jacqueline Kraemer, *Academic Programs in Alternative Education: An Overview* (National Center on Education and the Economy), April 2006 .....20, 21

Social Policy Research Associates, *Evaluation of the YouthBuild Youth Offender Grants* (Final Report May 2009).....17

Arnold J. Sameroff et al., *Stability of Intelligence from Preschool to Adolescence: The Influence of Social and Family Risk Factors*, 64 Child Development 80 (1993).....11

Catherine Sebastian, *The Second Decade: What Can We Do About The Adolescent Brain?* 1 Opticon1826 1 (2007).....9

Ronald D. Stephens & June Lane Arnette, *From the Courthouse to the Schoolhouse: Making Successful Transitions* (U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention), Feb. 2000.....18, 28

Laurence Steinberg, & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 Developmental Psychology 1531 (2007).....13

Tary Tobin, & Jeffrey Sprague, *Alternative Education Strategies: Reducing Violence in School and the Community*, 8 J. Emotional & Behav. Disorders 177 (2000).....20

TABLE OF AUTHORITIES – Continued

Page

Paul Tough, *What It Takes to Make a Student*, The New York Times Magazine, Nov. 26, 2006 23

U.S. Charter Schools Website, New Non-Federal Research and Reports, http://www.uscharterschools.org/cs/r/query/q/1558?x-title=New+Non-Federal+Research+and+Reports 18

U.S. Department of Education, Office of Educational Research and Improvement, *Education Reform and Students at Risk: Studies of Education Reform* 37 (1997) 23

U.S. Department of Education, Office of Innovation and Improvement, *Charter High Schools: Closing the Achievement Gap* (2006) ..... *passim*

Interview with Nora Volkow, M.D., Director of the National Institute on Drug Abuse (NIDA), The Challenge, Vol. 14, No. 3 (U.S. Department of Education, Office of Safe and Drug-Free Schools), 2007 12

Don Vereen, *Research Shows Consequences of Drug Abuse on the Teenage Brain*, The Challenge Vol. 14, No. 3 (U.S. Department of Education, Office of Safe and Drug-Free Schools), 2007 12

Nora Volkow & Ting-Kai Li, *The Neuroscience of Addiction*, 8 Nature Neurosci. 1429 (2005) 13

TABLE OF AUTHORITIES – Continued

Page

Daniel R. Weinberger et al., *The Adolescent Brain: A Work in Progress* 19 (The National Campaign to Prevent Teen Pregnancy), 2005.....9

David Whitman, *Sweating the Small Stuff: Inner-City Schools and the New Paternalism* (Thomas B. Fordham Institute), 2008 .....18, 19, 24

STATEMENT OF *AMICI*[1]

Amici curiae are leading educators, scholars, and child advocates who believe that all children have the potential for growth and transformation so long as society does not give up on them.[2] Several *amici* are leaders of alternative education schools and programs who serve so-called "at-risk"[3] youth – adolescents who have been incarcerated, exhibited disruptive or violent behavior, dropped out of school, or who disproportionately face the insidious obstacles of poverty, neglect, violence, addiction, and other often incapacitating social harms. As educators, *amici* are intimately familiar with the dynamic, transient nature of youth and therefore categorically reject the notion that children are incorrigible and thus cannot be changed. On the contrary, educators know first-hand

---

[1] No counsel for any party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters of consent from the parties have been filed with the Clerk's office.

[2] A full statement of each *amicus*'s interest can be found in the Appendix.

[3] The term "at-risk" encompasses a wide range of vulnerability factors. The No Child Left Behind Act of 2001, for example, defines an "at-risk" youth to include "a school aged individual who is at-risk of academic failure, has a drug or alcohol problem, is pregnant or is a parent, has come into contact with the juvenile justice system in the past, is at least 1 year behind the expected grade level for the age of the individual, has limited English proficiency, is a gang member, has dropped out of school in the past, or has a high absenteeism rate at school." 20 U.S.C. § 6472(2).

that because adolescents are still developing cognitively, socially, emotionally, and even physically, they possess an inherent capacity for positive growth and development. That defining characteristic of youth means that even the most at-risk or troubled child has the potential to transform his life as he matures. In light of these fundamental principles, which motivate *amici* to nourish each child's potential for positive development, *amici* write here to express their deep concern about the sentences at issue in these cases.

In particular, *amici* firmly believe that sentencing juveniles to life without parole ("LWOP") for non-homicide crimes committed during their youth wrongly ignores children's inherent potential to mature and rehabilitate, and cruelly deprives adolescents of any opportunity to utilize those qualities to one day become contributing members of society. Such sentences run counter to prevailing views about adolescent development, which are reflected in educators' professional consensus regarding the most successful education practices in the United States. Accordingly, *amici* respectfully submit that treating the failings of a minor like those of an adult is egregiously misguided and that ignoring adolescents' capacity for transformation by condemning juveniles to die in prison constitutes excessive, cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

SUMMARY OF ARGUMENT

In light of the categorical differences between adolescents and adults, which are fundamental to the mission and best practices of educators, it offends civilized standards of decency to sentence adolescents to die in prison for non-homicide offenses committed during their youth. To do so would fail to appreciate the lesser moral culpability of juvenile offenders and their diminished ability, as compared to adults, to understand the consequences of their conduct and to control their immediate surroundings in order to escape negative influences. *Amici* therefore agree with Petitioners that, in light of these fundamental differences between adults and adolescents, there is no justification for imposing LWOP sentences on juveniles as a means of deterrence or retribution for non-homicide offenses.

Even more fundamentally, educators like *amici* agree that sentencing children to die in prison for non-homicide offenses senselessly ignores children's capacity for growth and rehabilitation so early in their lives, wrongly treating those adolescents as irretrievably depraved. As the work of educators vividly demonstrates, however, juveniles are particularly amenable to the positive influences of education, community support, and rehabilitation because they are still developing. Alternative schools and programs, in particular – many of them led by *amici* – are committed to the principle that all children, regardless of the odds, have the potential to succeed. The remarkable success of these programs

demonstrates that even the most troubled or at-risk child can prevail over adversity, reform harmful behavior, and grow into a contributing member of society. Educators therefore reject as fundamentally erroneous the central premise upon which LWOP sentences for juveniles are founded – that some children are so irretrievably bad that they are incorrigible and cannot change. Because juvenile LWOP sentences for non-homicidal crimes deny those children's potential for growth and development, such sentences are out of step with norms of civilized society, and in violation of the prohibition on excessive, cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution.

ARGUMENT

THE WORK OF EDUCATORS DEMONSTRATES THAT BECAUSE JUVENILES ARE UNFORMED AND HAVE AN INHERENT CAPACITY FOR POSITIVE GROWTH AND REHABILITATION, LIFE WITHOUT PAROLE SENTENCES, WHICH WHOLLY DISREGARD THESE UNIQUE CHARACTERISTICS OF YOUTH, ARE EXCESSIVE, CRUEL AND UNUSUAL IN VIOLATION OF THE EIGHTH AMENDMENT.

The Eighth Amendment, which prohibits cruel and unusual punishments and applies to the States through the Fourteenth Amendment, "guarantees individuals the right not to be subjected to excessive

sanctions." *Roper v. Simmons*, 543 U.S. 551, 560 (2005). That right is grounded in the fundamental principle that punishment should be proportional to the offense and that the government has a duty "to respect the dignity of all persons." *Id.* (citing *Atkins v. Virginia*, 536 U.S. 304, 311 (2002)). Consistent with those precepts, in evaluating whether a particular sentence violates the Eighth Amendment, this Court considers whether punishments are so disproportionate and contrary to "'evolving standards of decency that mark the progress of a maturing society'" as to be excessive or cruel and unusual. *Id.* at 561 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)); *Atkins*, 536 U.S. at 311 n.7 (noting that the Amendment proscribes "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive"). Thus, to be proportionate and constitutional, punishment must be appropriately "justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution." *Kennedy v. Louisiana*, 128 S.Ct. 2641, 2649 (2008).

This Court in *Roper* identified "three general differences" between adolescents and adults which can render certain sentences, when applied to juveniles, unjustified by those penological interests and therefore excessive, cruel or unusual. 543 U.S. at 569-70. First, because adolescents lack maturity and are still developing, they have an underdeveloped sense of responsibility. *Id.* at 569. Second, juveniles, as compared to adults, are both more vulnerable to

negative influences and societal pressures, including peer pressure, and less able to control their own environment in order to escape them. *Id.* Third, because adolescents are still developing, their characters and identities are not fully-formed. *Id.* at 570. These differences – which educators of at-risk students confront on a daily basis – indicate that juveniles are less culpable than adults for their mistakes or harmful behavior and that it is only "the rare juvenile offender whose crime reflects irreparable corruption" with absolutely no potential for rehabilitation. *Id.* at 573.

Here, in light of these categorical differences between adolescents and adults, with which educators are intimately familiar, "it would offend civilized standards of decency," *id.* at 561 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion)), to sentence adolescents to die in prison for non-homicide offenses committed during their youth. Because doing so ignores juveniles' inherent capacity for positive growth and transformation, *amici* respectfully submit that such sentences are inconsistent with society's prevailing view of adolescents as reflected in the scholarship and accepted practices undergirding the work of leading educators.

A. Education Theory And Practice Have Long Recognized The Dynamic, Transient Nature Of Youth.

The very purpose of education – to help children develop into fully formed and self-sufficient persons –

speaks to the dynamic, unformed nature of youth. *See* Lawrence Kohlberg & Rochelle Mayer, *Development as the Aim of Education*, 42 Harv. Educ. Rev. 449, 493 (1972) (describing goal of education as "development, both intellectual and moral"); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) ("[E]ducation prepares individuals to be self-reliant and self-sufficient participants in society."). Indeed, education theorists and scholars have long recognized that the best education practices are attuned to adolescents' unformed character and minds. Thus, the earliest proponents of so-called "progressive" education argued that traditional education models inappropriately "impose[d] adult standards, subject-matter, and methods upon those who are only growing slowly toward maturity." John Dewey, *Experience and Education* 18-19 (1938). Leading education theorist John Dewey observed that "the gulf between the mature or adult" world and that of the young required educational approaches responsive to the experiences and developmental needs of youth. *Id.* at 21-22, 50 ("Education as growth or maturity should be an ever-present process."); *see also* Jerome Bruner, *The Process of Education* 9 (1960) ("[S]chools must also contribute to the social and emotional development of the child if they are to fulfill their function of education for life in a democratic community and for fruitful family life"). Nurturing adolescents for positive development and growth has remained an essential component of education and a vital objective of educators.

Today, there exists a "national consensus on the need for 21st century schools to offer more than academic instruction to foster success in school and life for all children." Mark T. Greenberg et al., *Enhancing School-Based Prevention and Youth Development Through Coordinated Social, Emotional, and Academic Learning*, 58 Am. Psychologist 466, 474 (2003) ("[M]ost educators, parents, students, and the public support a broader educational agenda that also involves enhancing students' social-emotional competence, character, health, and civic engagement."). Many school-based prevention and youth development programs therefore aim to holistically foster adolescents' social, moral, and intellectual growth. *Id.* at 468-70. Schools serving at-risk students, in particular, often emphasize the development of morals and responsibility in their pupils. *See infra* Part C.

These programs, which recognize the positive impact of education on the unformed character and minds of youth, are supported by a wealth of evidence-based research showing that the brain continues to develop throughout childhood and in particular during the teenage years. *See* B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 Biological Psychiatry 241, 253 (2000); *see also* Usha Goswami, *Neuroscience and Education*, 74 Brit. J. Educ. Psychol. 1, 3 (2004) (noting that "[b]rain volume quadruples between birth and adulthood"). A better understanding of development in the adolescent brain has shed light on and disproved

certain assumptions regarding how adolescents think, learn, and behave. *See generally* Goswami, *supra*. For example, "the frontal and parietal cortices" of the brain – the areas "associated with complex abilities such as planning, paying attention, and interacting with other people" – develop significantly during the teenage years and into the twenties. *See* Catherine Sebastian, *The Second Decade: What Can We Do About The Adolescent Brain?* 1 Opticon1826 1, 2 (2007), *available at* http://www.ucl.ac.uk/opticon1826/archive/issue2/VfPLIFE_Teenagers.pdf (noting that the "most profound differences between adults and adolescents occur at the decisionmaking or executive levels of processing"); *see also* Deanna Kuhn, *Do Cognitive Changes Accompany Development in the Adolescent Brain?* 1 Persp. Psychol. Sci. 59, 60 (2006). These changes are of interest to educators because they determine key competencies related to learning, such as the ability to exercise self-control and reason, and to "anticipat[e] the outcome of events." Sebastian, *supra*, at 2. All of this evidence indicates significant differences between adults and adolescents in brain functioning and behavior and confirms what has largely been implicit in education theory: that "teenagers are not the same as adults," but rather are works-in-progress who do not function with the same competencies, maturity, or cognitive abilities as adults. *See* Daniel R. Weinberger et al., *The Adolescent Brain: A Work in Progress* 19 (The National Campaign to Prevent Teen Pregnancy), 2005, *available at* http://www.thenationalcampaign.org/resources/pdf/BRAIN.pdf.

The significant differences between adults and adolescents – which educators confront every day – including the ability to exercise self-control, to reason, and to anticipate the outcome of events, *see* Sebastian, *supra*, at 2, indicate that adolescents are often unable to engage in the kind of foresight or "cost-benefit analysis that attaches any weight to the possibility of" a death-in-prison sentence. *See Thompson*, 487 U.S. at 837 (suggesting that offenders under 16 years old do not consider the consequence of death sentences for homicides). Because of that underdeveloped ability to engage in complex thought or anticipate the outcome of events, there is no legitimate justification for imposing LWOP sentences on juveniles as a means of deterrence. *See id.* at 836-38.

In addition, because the intellectual, social, and emotional maturity, and "character of a juvenile [are] not as well formed as that of an adult," irresponsible or harmful behavior by a juvenile "'is not as morally reprehensible as that of an adult.'" *Roper*, 543 U.S. at 570 (quoting *Thompson*, 487 U.S. at 835). This lesser culpability of juvenile offenders also renders LWOP sentences unjustified on grounds of retribution. *See Atkins*, 536 U.S. at 319 ("[T]he severity of the appropriate punishment necessarily depends on the culpability of the offender."). Accordingly, LWOP sentences for juveniles are unjustified by sufficient penological interests and are therefore excessive, cruel and unusual under the Eighth and Fourteenth Amendments to the United States Constitution.

B. Educators Recognize That Children Are Particularly Susceptible To Negative Influences And Societal Harms, Including Poverty, Violence, Addiction, And Peer Pressure.

As educators, *amici* also recognize that because children are still developing, they are especially vulnerable to negative influences and societal harms, including poverty, violence, addiction, and peer pressure. Indeed, the education theorist John Dewey recognized in 1938 that educational experiences do "not occur in a vacuum" but that children's ability to learn and positively develop is dramatically affected by the social environments in which they live and learn. *See* Dewey, *supra*, at 39-40. That principle has been confirmed by subsequent research showing that the more risk factors present in childhood environments – including whether children grow up in dangerous, polluted, and deteriorating neighborhoods, attend neglected and poorly functioning schools, or are exposed to violence and neglect in the home – the greater the threat to healthy adolescent development and cognitive growth. *See* Gary W. Evans, *The Environment of Childhood Poverty*, 59 Am. Psychologist 88 (2004); Brian J. Bigelow, *There's an Elephant in The Room: The Impact of Early Poverty and Neglect on Intelligence and Common Learning Disorders in Children, Adolescents, and Their Parents*, 34 Developmental Disabilities Bulletin 177, 185 (2006); *see also* Arnold J. Sameroff et al., *Stability of Intelligence from Preschool to Adolescence:*

The Influence of Social and Family Risk Factors, 64 Child Development 80, 80-97 (1993).

Poverty, in particular, is overwhelmingly "harmful to the physical, socioemotional, and cognitive well-being of children." Evans, *supra*, at 88; *see also* Bigelow, *supra*, at 202 ("The deleterious effects of stressful levels of poverty on early child development are no longer subject to serious debate."). Thus, the evidence suggests that poverty can impair brain growth and development starting from birth and "is often the most important variable in understanding children's learning disorders." Bigelow, *supra*, at 177-78.

Adolescents are also particularly vulnerable to drug abuse and addiction in light of the developing nature of their brains. Don Vereen, *Research Shows Consequences of Drug Abuse on the Teenage Brain*, The Challenge Vol. 14, No. 3 (U.S. Department of Education, Office of Safe and Drug-Free Schools), 2007, at 1, *available at* http://www.thechallenge.org/challenge_14_3.pdf. According to the U.S. Department of Education, juveniles are particularly susceptible to drug abuse because "[t]he critical areas in the brain used for making judgments and comprehending complex concepts like safety and freedom are not fully developed at age 15" and do not fully develop until the twenties. *Id.* Accordingly, experts contend that adolescents' heightened risk of addiction is often not simply a product of "social angst" or experimentation, but rather results from the fact that such "factors occur during a period of dramatic

changes" in the adolescent brain. *Interview with Nora Volkow, M.D., Director of the National Institute on Drug Abuse (NIDA)*, The Challenge, Vol. 14, No. 3 (U.S. Department of Education, Office of Safe and Drug-Free Schools), 2007, at 2.[4]

Research further indicates that adolescents are particularly susceptible to the negative influence of peers. *See* Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 Developmental Psychology 1531 (2007) ("[T]here is little doubt that peers actually influence each other and that the effects of peer influence are stronger during adolescence than in adulthood."); *see also* Evans, *supra*, at 78, 88 (noting children from low-income families who are exposed to unstable home environments and other risk factors, are "more likely to rely on peers than adults" and are particularly vulnerable to aggressive peers). And, significantly, "susceptibility to peer pressure" is greatest when anti-social behavior and delinquency are involved. Steinberg, *supra*, at 1532. Such susceptibility, and with it, the likelihood of anti-social behavior, however, abates with age and development.

---

[4] Preliminary research also suggests that the brain's neurological response to drugs such as nicotine and marijuana is different in adolescence than in adulthood. *See* Nora Volkow & Ting-Kai Li, *The Neuroscience of Addiction*, 8 Nature Neurosci. 1429 (2005). Scientists are beginning to explore how this neurological difference contributes to adolescents' predisposition to addiction. *Id.*

In working to advance the social and emotional development of adolescents, educators necessarily confront these vulnerabilities on a daily basis. Their experience reflects what this Court recognized in *Roper*: that "juveniles are more vulnerable or susceptible to negative influences and outside pressure, including peer pressure" because of their "lack of maturity" and underdeveloped character and identity. 543 U.S. at 569. While "[t]hese qualities often result in impetuous and ill-considered actions and decisions," *id.* (internal citation and quotations omitted), as this Court has recognized, juveniles' "vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim to be forgiven for failing to escape negative influences in their whole environment." *Id.* at 570 (citing *Stanford v. Kentucky*, 492 U.S. 361, 395 (1989) (Brennan, J., dissenting)). This difference between adolescents and adults further renders LWOP sentences for juveniles unjustified on grounds of deterrence or retribution. Accordingly, such sentences are excessive, cruel and unusual under the Eighth and Fourteenth Amendments to the United States Constitution.

C. The Success Of Educators Serving At-Risk Juveniles Demonstrates That All Juveniles Have A Unique Capacity For Transformation.

Most fundamentally, the experience of educators in successfully teaching at-risk adolescents who have been so often dismissed as "too difficult" or "not worth

it" undermines the primary basis for LWOP sentences for juveniles – the notion that some children are so irretrievably depraved that they are incapable of reform. As the work of *amici* and other educators demonstrate, all adolescents have the potential for positive growth and development, and even the most troubled youth can change and be rehabilitated.

The Department of Education recently decried that "[o]ne of the more insidious myths about education is that students who have traditionally been characterized as 'at risk' cannot manage a rigorous college preparatory curriculum and that if pushed too hard they will drop out of school." U.S. Department of Education, Office of Innovation and Improvement, *Charter High Schools: Closing the Achievement Gap* 30-31 (2006), *available at* http://www.ed.gov/admins/comm/choice/charterhs/report.pdf. The achievements of at-risk youth in alternative schools and other programs debunk that misconception, demonstrating that when adolescents' developmental needs are properly addressed, these children can succeed. *Id.* at 22, 31. These positive results speak to the potential of all juveniles – even the most at-risk or troubled child – to positively develop and transform their lives as they mature to become contributing members of society.

Indeed, a critical component of successfully reaching at-risk students is educators' refusal to treat them as "lost causes" who are incapable of change. In fact, the available evidence suggests that when schools and communities reject troubled or at-risk

children, adolescents are even more likely to experience repeated failure. *See* Cheryl M. Lange & Sandra J. Sletten, *Alternative Education: A Brief History and Research Synthesis*, Project FORUM (National Association of State Directors of Special Education), 2002, at 12, *available at* http://www.projectforum.org/docs/alternative_ed_history.pdf (finding that studies of school dropouts indicate that "school climate of rejection by teachers or peers has a strongly negative effect on the prospect for students at risk"); Sarah Ingersoll & Donni LeBoeuf, *Reaching Out to Youth Out of the Education Mainstream*, Juvenile Justice Bull. (U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention), Feb. 1997, at 6, *available at* http://www.ncjrs.gov/pdffiles/163928.pdf (noting that challenges to reintegration of students from the juvenile justice system are due to the fact that "these youth frequently face parents who have given up on them, teachers and fellow students who fear them, and citizens who do not want them in the community"); *see also* National Research Council, Commission on Behavioral and Social Sciences and Education, *Losing Generations: Adolescents in High-Risk Settings* 102-03, 117 (1993); Mark Dynarski & Philip Gleason, *How Can We Help? What We Have Learned from Evaluations of Federal Dropout-Prevention Programs* 5 (1998) (submitted to U.S. Department of Education by Mathematica Policy Research, Inc.), *available at* http://www.mathematica-mpr.com/publications/PDFs/dod-syn.pdf; Laudan Y. Aron, *An Overview of Alternative Education* (The Urban Institute), Jan. 2006, at 15, *available at*

http://www.urban.org/UploadedPDF/411283_alternative_education.pdf. To be sure, at-risk students may exhibit defiant and disruptive behavior, making the task of education even more challenging. *See* James Forman, Jr., *Out of Jail and Into Jobs*, 8 Educ. Next 44, 48 (Fall 2008) *available at* http://media.hoover.org/documents/ednext_20084_44Forman.pdf. During the past few decades, however, innovative educators have taken stock of these entrenched obstacles, and sought to alter existing institutional structures and challenge preconceived notions about at-risk students, including those with behavioral problems. By addressing the needs of especially defiant, disruptive, at-risk students, these educators have enabled thousands of students to reform their behavior, overcome their challenges, and achieve success.

In particular, over the past half-century, educators and policymakers have increasingly embraced evolving education models for helping students at risk of failure in school. Lange & Sletten, *supra*, at 1; *see also* No Child Left Behind Act of 2001, § 1401(b), 20 U.S.C. § 6421(b) (providing funding for state and local educational agencies to "establish or improve programs of education for neglected, delinquent, or at-risk children or youth"). Innovative schools and programs have had dramatic success in maximizing at-risk students' potential, including by improving test scores, increasing college placements and achieving greater stability and transition to work. *See generally Charter High Schools*, *supra*; Social Policy Research Associates, *Evaluation of the YouthBuild*

Youth Offender Grants (Final Report May 2009) (Prepared for Department of Labor/ETA), *available at* http://wdr.doleta.gov/research/FullText_Documents/Evaluation%20of%20the%20YouthBuild%20Youth%20Offender%20Grants%20%2D%20Final%20Report%2E pdf; U.S. Charter Schools Website, New Non-Federal Research and Reports, http://www.uscharterschools.org/cs/r/query/q/1558?x-title=New+Non-Federal+Research+and+Reports; David Whitman, *Sweating the Small Stuff: Inner-City Schools and the New Paternalism* (Thomas B. Fordham Institute), 2008, *available at* http://www.edexcellence.net/doc/20080826-sweating-the-small-stuff.pdf.

In addition to improving students' scores and easing transition for troubled youth into the workforce, programs aimed directly at preventing crime by juveniles exposed to violence have been found to "cost-effectively intervene in young and troubled lives to prevent harmful and costly behaviors." Little Hoover Commission, *Never Too Early, Never Too Late: To Prevent Youth Crime and Violence* ii (June 2001), *available at* http://www.lhc.ca.gov/studies/159/report159.pdf. Additionally, studies of prison education programs have found that inmates who participate in those programs are more likely to be employed and less likely to re-offend than nonparticipants – if and when they are released. Ronald D. Stephens & June Lane Arnette, *From the Courthouse to the Schoolhouse: Making Successful Transitions* (U.S. Department of Justice, Office of Juvenile Justice and

Delinquency Prevention), Feb. 2000, at 4, *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/178900.pdf.

Studies of these efforts prove "that all students – even those who are often labeled as slow, lazy, or troubled in traditional schools – can be productive and successful in creative educational settings that provide a personalized approach." J.D. Hoye & Chris Sturgis, *The Alternative Pathways Project: A Framework for Dropout Reduction and Recovery* 5 (June 2005), *available at* http://www.ytfg.org/documents/AltPathv.7.7Julyfin_000.pdf; *see also* Whitman, *supra*, at 252. Many of the most effective and successful alternative schools include within their curriculum practices and methods that specifically address the developmental changes experienced by at-risk students during adolescence as well as their vulnerability to negative influences and societal harms. *See Charter High Schools*, *supra*, at 22 (observing that successful charter secondary schools have specialized programs to address "any adolescent life issue that arises, whether academic, personal, or social"); *see also* Jodie L. Roth & Jeanne Brooks-Gunn, *Academic Success, Adolescence*, in *Encyclopedia of Primary Prevention and Health Promotion* 140, 143 (Thomas P. Gullotta & Martin Bloom eds., 2003) (citations omitted) ("Adults who support adolescents' learning with high expectations, an understanding of the cognitive, social, and emotional changes that occur during adolescence, and a solid grasp of the subject

matter, create a secure and positive learning environment that encourages and promotes adolescents' academic success."). Other identified best practices are also tailored to address the vulnerabilities of at-risk adolescents and to maximize the potential for positive growth and development. *See* Tary Tobin & Jeffrey Sprague, *Alternative Education Strategies: Reducing Violence in School and the Community*, 8 J. Emotional & Behav. Disorders 177, 177-86 (2000) (finding alternative education practices that promote success among at-risk youth include small class size to enable individualized instruction, "clearly defined rules and consequences," positive reinforcement, a focus on social skills, mentoring and parental involvement); Dynarski & Gleason, *supra*, at 4; *see also Charter High Schools*, *supra*, at 7-32 (reviewing "common themes" of high achieving schools); Hoye & Sturgis, *supra*, at 7-9 (same); Aron, *supra*, at 11-13 (same); Betsy Brown Ruzzi & Jacqueline Kraemer, *Academic Programs in Alternative Education: An Overview* (National Center on Education and the Economy), April 2006, at 31, *available at* http://www.doleta.gov/youth_services/pdf/ae_overview_text.pdf (same); Forman, Jr., *supra*, at 47-48; (same); Lange & Sletten, *supra*, at 10-12 (same).

Recognizing the particular vulnerability of adolescent at-risk students, many alternative schools have sought to emphasize inviting school climates that foster individual relationships between teachers

and students by providing small schools and classes and counseling services. The animating theory of many of these schools is "that a sense of caring will encourage students to persist in their school experience and, together with a sense of academic success, will increase self-esteem." Lange & Sletten, *supra*, at 12; *see also* Geoffrey Canada, *fist stick knife gun: A Personal History of Violence in America* 109 (1995) (explaining need for schools and programs to provide to at-risk children "sense of protection and security"); Dynarski & Gleason, *supra*, at 4-5 (describing counseling as primary tool to overcome obstacles to progress and success in schools used by dropout-prevention program); *Charter High Schools*, *supra*, at 19-24 (identifying "wraparound student support" – including low student-to-teacher ratio, counselors, social workers, family and community involvement – as a common theme of charter secondary schools that have successfully closed the achievement gap); Ruzzi & Kraemer, *supra*, at 31 (highlighting importance of "personal relationships between the students and the teachers and individualized attention to each student's learning needs, strengths, and life situations"); Aron, *supra*, at 12 (same).

For example, the See Forever Foundation and the Maya Angelou Public Charter School, based in Washington, D.C., which serve "kids who were in school, who had been suspended or expelled, who had been locked up" achieve impressive academic

outcomes, with one of its schools ranked in the top quarter of similar schools for academic improvement. Forman, Jr., *supra*, at 49. The co-founder of the school, *amicus* James Forman, Jr., attributes the students' achievement not only to a relevant and interesting curriculum, but also to "high expectations," and to the "caring, trusting, and loving relationships" that are fostered in the educational setting. *Id.* at 47-48. The teaching methods and environments of institutions like these are specifically designed to address adolescents' particular stage of development and their attendant developmental needs. *See* Roth & Brooks-Gunn, *supra*, at 143.

Similarly, effective educational models for detained and incarcerated youth emphasize individual and family counseling, treatment, and development of conflict resolution skills. Ingersoll & LeBoeuf, *supra*, at 7. For example, in a study of more than twenty dropout-prevention programs throughout the country, researchers found that alternative middle school programs, which provided intensive counseling services and individualized attention through small classroom settings to students with low ability or who had felt alienated and failed in regular schools, succeeded in keeping kids in school and advanced their academic progress. Dynarski & Gleason, *supra*, at 12-20. Specifically, students in the programs "were half as likely to drop out" and advanced further in school than they did when educated under traditional models. *Id.* at 18-20.

In addition, because adolescents' moral consciousness is still developing, and in order to counteract their particular susceptibility to negative influences and societal harms, innovative schools seek to influence students' behavior by incorporating values and character education into the curriculum. Paul Tough, *What It Takes to Make a Student*, The New York Times Magazine, Nov. 26, 2006. Educators in these institutions have stressed the development of "social and emotional competencies" in teaching at-risk students. Forman, Jr., *supra*, at 50; *see also* U.S. Department of Education, Office of Educational Research and Improvement, *Education Reform and Students at Risk: Studies of Education Reform* 37 (1997) (finding that successful charter schools serving at-risk populations "provide students with emotional stability and intellectual engagement" and create "educational communities of resilience") (internal quotation marks and citations omitted); Peter E. Leone et al., *School Failure, Race, and Disability: Promoting Positive Outcomes, Decreasing Vulnerability for Involvement with the Juvenile Delinquency System* (The National Center on Education, Disability, and Juvenile Justice), Oct. 2003, at 12-13, *available at* http://www.edjj.org/Publications/list/leone_et_al-2003.pdf (finding that focus on cognitive, emotional and moral development aids at-risk youth in making "appropriate behavioral choices in the presence of multiple risk factors"). Also, studies of successful individual classrooms have noted that a focus on students' moral development and the encouragement of ethical deliberation are integral to

academic achievement. *See, e.g.*, Mike Rose, *Possible Lives: The Promise of Public Education in America* 432 (1995). These educational practices are predicated on an accepted truth that LWOP sentences ignore: adolescents are still developing and ought not be viewed as lost causes, incapable of educational, social, or moral progress.

For example, high-achieving charter schools – such as those operated as part of the Knowledge is Power Program (KIPP) and Achievement First – have built upon psychological research, and stressed the importance of self-discipline as a means to high academic achievement. Tough, *supra* (describing innovative and successful educators' reliance on research stressing importance of "'noncognitive' abilities like self-control, adaptability, patience and openness" to achieving academic success); Angela L. Duckworth & Martin E.P. Seligman, *Self-Discipline Outdoes IQ in Predicting Academic Performance of Adolescents*, 15 Psychological Sci. 939, 944 (2005) ("We believe that many of America's children have trouble making choices that require them to sacrifice short-term pleasure for long-term gain, and that programs that build self-discipline may be the royal road to building academic achievement."); David Whitman, *supra*, at 20, 38, 260-62 (noting that emphasis on behavior and order was most important factor to success of at-risk students in innovative secondary schools). Similarly, critical to the success of the SEED Public Charter

School of Washington, D.C., a school aimed at underserved students from low socioeconomic backgrounds – beyond its intensive academic program – is its emphasis on "Habits For Achieving Life Long Success," which include life skills, conflict resolution, time management, making good choices and a "focus on five core values: respect, responsibility, self-discipline, compassion, and integrity." *Charter High Schools*, *supra*, at 56. The Maya Angelou Public Charter School likewise focuses on fostering resiliency in its students, stressing self-control, delaying gratification, goal-setting, and acceptance of responsibility. Forman, Jr., *supra*, at 50. The schools' emphasis on behavior modification and character development and their resulting success are a testament to educators' understanding of the dynamic nature of adolescence and the capacity of even troubled youth to reform and flourish as they grow towards adulthood.

Fundamentally, educators of at-risk students all unequivocally reject the notion that children cannot be changed or are incorrigible and therefore cannot be educated. *See* Ingersoll & LeBoeuf, *supra*, at 9 (finding that effective programs for at-risk youth may "prevent crime and delinquency and nurture each child's potential to become a successful and contributing member of society" and that "[e]ach young person deserves the opportunity to demonstrate that he or she is capable of success"); Nancy Martin & Samuel Halperin, *Whatever It Takes: How Twelve Communities Are Reconnecting Out-of-School Youth*

(American Youth Policy Forum), 2006, at 2-3, *available at* http://www.aypf.org/publications/WhateverItTakes/WITfull.pdf (finding that all successful dropout recovery programs viewed youth "as potentially motivated young adults and students of promise"). The students' remarkable rates of achievement at these schools and in these programs validate the view that all children have the capacity for positive growth and development, and that even troubled children can transform themselves as they mature.

The SEED school, for example, was founded on "the premise that all children can succeed in school, regardless of social or economic barriers, if given the right environment and support." *Charter High Schools*, *supra*, at 55. Consequently, SEED students outperform their peers in Washington, D.C. schools by an almost 2 to 1 margin. *Id.* at 58. In addition, 100 percent of the class of 2005 was accepted to four-year colleges. *Id.*

Similarly, The Door, an organization in New York City that provides a range of integrated services to over 11,000 youth each year, 20 percent of whom have been involved with the justice system, and 25 percent of whom have either been homeless or been placed in foster care, operates based upon "the philosophy that every young person has untapped potential." The Door, *The Door 2008 Annual Report* 1, 3 (2003), *available at* http://www.door.org/pdf/Door%20Annual%20Report_FINAL%20FOR%20WEB.pdf. Through the Door's support system and nurturing of that potential, 600

youth applied for post-secondary education in 2008, and 70 percent of those applicants are expected to begin school in the fall of 2009. *Id.* at 5.

Educators concur that immensely critical to the success of at-risk students, particularly those who have failed in traditional schools or been incarcerated, is instilling in them the understanding that "the adults in the room won't give up on them, won't just teach the kids who are getting it, and won't write them off as incorrigible." Forman, Jr., *supra*, at 48. Indeed, at-risk students interviewed in studies of secondary charter schools that have achieved notable success in academic outcomes and college placement have all identified educators' trust and confidence in their capacity to change and succeed as instrumental to their own achievement. *See Charter High Schools, supra*, at 11 ("'They push and they push hard. Knowing that they care is my safety net. Teachers believed in me so I started to work hard and then harder.'" (quoting student from YES College Preparatory School, Southeast Campus, Houston, Texas)); *id.* at 38 ("'I had teachers tell me I was stupid, dumb, wouldn't amount to anything. Here it is okay to have learning differences. I'm comfortable being me because they don't let you fall, but if you do they pick you up.'" (quoting student from Gateway High School, San Francisco)); *id.* at 46 ("'[H]ere I can change myself.'" (quoting student from Minnesota New Country School, Henderson, Minnesota)); *id.* at 50 ("'Here the teachers don't give up on you. They are working for your future, to help you go to college.'" (quoting student from North Star Academy Charter

School of Newark)); *id.* at 62 ("'I think this school is amazing because over the years it kept me out of trouble. I would be in jail or dead right now, because a lot of my friends are in jail or dead.'" (quoting student from Toledo School for the Arts)).

The work of educators demonstrates that as juveniles grow and mature, they are amenable to positive influences such as education, community support, and rehabilitation precisely because they are still developing. This illustrates that as compared to adults, juveniles have a greater capability to reform their behavior in order to become productive, healthy citizens. Indeed, the successful programs of several *amici* show that even the most troubled or at-risk child can prevail over disadvantage, hardships, and even serious adolescent mistakes and transform his life as he matures so long as society does not give up on him. Increased test scores, the closing of the achievement gap, and the high rate of college acceptances at many of the alternative schools serving at-risk youth, *see, e.g.*, *id.* at 35-66, as well as the reduction in recidivism rates associated with prison education programs, *see* Stephens & Arnette, *supra*, at 4, all demonstrate that adolescents can overcome some of the most difficult obstacles when their cognitive, social, and emotional capacities are nurtured and their potential for positive growth is not denied.

As this Court observed in *Roper*, children's ongoing development and susceptibility to outside pressures render it "less supportable to conclude that even a heinous crime committed by a juvenile is

evidence of irretrievably depraved character." 543 U.S. at 570 (citing *Johnson v. Texas*, 509 U.S. 350, 368 (1993) (noting that youth is a mitigating factor because "'signature qualities of youth are transient'" and that "'impetuousness and recklessness'" diminish with maturity)); *see also* Juvenile Detention Alternatives Initiative, *Detention Reform: An Effective Public Safety Strategy* 4 (2007), *available at* http://www.aecf.org/upload/PublicationFiles/jdai_facts2.pdf (citing research showing "that three-fourths of all youth who commit serious violent crimes during adolescence terminate their offending by age 21"). In fact, the positive results from *amici* and other educators demonstrate that even the most troubled youth, are capable of rehabilitation – a penological interest bearing on the appropriateness of particular sentences. *See Kennedy*, 128 S.Ct. at 2649. Therefore, as this Court recognized, "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Roper*, 543 U.S. at 570. Accordingly, in light of adolescents' inherent potential for transformation, which distinguishes juveniles from adults, LWOP sentences for juveniles who have committed non-homicide offenses are excessive, cruel and unusual under the Eighth and Fourteenth Amendments to the United States Constitution.

D. Life Without Parole Sentences For Juveniles Are Contrary To Civilized Standards Of Decency.

The experience of educators in successfully teaching at-risk adolescents who have been so often dismissed as "too difficult" or "not worth it" demonstrates that depriving adolescents of the opportunity to utilize their inherent potential for positive growth and development by sentencing them to die in prison for mistakes made during their youth is contrary to civilized standards of decency. As this Court has recognized, "evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule." *Kennedy*, 128 S.Ct. at 2649. For that reason, "measures of consensus" that reflect society's view regarding standards of human dignity have appropriately informed this Court's jurisprudence addressing the excessiveness or cruelty of particular punishments. *See id.* at 2657 (finding "social consensus against the death penalty for the crime of child rape" based on infrequency of executions); *Atkins*, 536 U.S. at 316 n.21 (citing views of leading mental health and religious experts as "additional evidence . . . [of a] much broader social and professional consensus" regarding the excessiveness of the death penalty for mentally retarded individuals); *Thompson*, 487 U.S. at 830 (citing views of "respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European

community" in concluding that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense). Thus, here, in determining whether LWOP sentences for juveniles are out of step with the norms of civilized society, the views of educators who are intimately familiar with the competencies and potential of youth are especially pertinent, and the successful practices of *amici* and other educators should inform the decision of this Court that LWOP sentences for juveniles are excessive, cruel and unusual.

As set forth above, in light of the undisputable differences between adults and adolescents, which are integral to the mission and best practices of educators, there is no justification consistent with the norms of civilized society for imposing LWOP sentences on juveniles as a means of deterrence or retribution for non-homicide offenses. Even more fundamentally, as professionals committed to nourishing each child's potential for success, educators like *amici* resolutely believe that wholly depriving adolescents of the opportunity to utilize their inherent capacity for positive growth and development by sentencing them to die in prison for mistakes made during their youth is contrary to civilized standards of decency. In fact, to deny children's inherent potential for growth and transformation would be contrary to the long-standing work and objectives of educators, which this Court has recognized "as pivotal to" preparing adolescents for citizenship and "maintaining the fabric" of civilized

society. *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (citing *Plyler v. Doe*, 457 U.S. 202, 221 (1982)). While educators cannot always predict which child who faces considerable odds in life will triumph over his disadvantaged circumstances or who will face ongoing adversity, they firmly believe that because adolescents are still developing cognitively, socially, and emotionally, society must give each adolescent a chance. Significantly, *amici* believe that realizing each child's potential is not simply a matter of resources: whether in prison educational programs, traditional public schools, or alternative schools, children are most likely to succeed when adults simply recognize their potential and refuse to give up on them because of failures during their youth.

In contrast to these prevailing views about adolescent growth and development, LWOP sentences for juveniles ignore children's capacity for growth and rehabilitation, so early in their lives, and treat them as irretrievably depraved. It is this aspect of a juvenile LWOP sentence in particular – the wholesale disregard of a child's inherent potential for transformation and the denial of any opportunity to utilize those qualities for positive growth – that categorically distinguishes it from other long-term, non-death prison sentences, and renders it contrary to civilized standards of decency. For these reasons, *amici* respectfully submit that such sentences are impermissibly excessive, cruel and unusual, and violate the

Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the decisions of the District Court of Appeal, First District, State of Florida should be reversed.

Respectfully submitted,

JOHN J. GIBBONS*
LAWRENCE S. LUSTBERG
AVIDAN Y. COVER
JENNIFER B. CONDON
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102
(973) 596-4500

July 23, 2009

**Counsel of Record*

APPENDIX

Geoffrey Canada is President and Chief Executive Officer of Harlem Children's Zone (HCZ). The organization began in 1970 working with young children and their families as New York City's first truancy-prevention program. As the crack epidemic tore through Harlem in the 1980s and 1990s, many inside and outside Harlem gave up hope. Believing that new approaches were necessary to save children in this disintegrating community, HCZ turned a local public school into a thriving community center and worked to make Harlem's schools safer. Following the organizational creed to do "whatever it takes" when it comes to helping children succeed, Mr. Canada, in 1997, launched the Harlem Children's Zone Project, which targeted a 24-block area in Central Harlem with a comprehensive range of services, including pre-school programs, parenting workshops, and health initiatives. The Zone Project today covers 100 blocks and serves over 10,000 children. Over the years, HCZ introduced several ground-breaking efforts, including the Promise Academies, two high-quality public charter schools. The Promise Academy middle school, in particular, has achieved remarkable success, having eliminated the achievement gap between its black students and the city average for white students. Mr. Canada and HCZ have been the subject of hundreds of media stories and received scores of awards recognizing their contribution to the cause of children and education. Mr. Canada's and HCZ's work are also the subject of the book by Paul

Tough, *Whatever It Takes: Geoffrey Canada's Quest to Change Harlem and America* (2008). Noting the great success of HCZ, President Obama has said he will seek to "replicate the Harlem Children's Zone in twenty cities across the country."

David Domenici and James Forman, Jr. are co-founders of See Forever Foundation and Maya Angelou Public Charter Schools. Concerned that children leaving the District of Columbia's juvenile detention facility had few programs to get them on track, in 1997, Mr. Domenici and Mr. Forman left their jobs as young lawyers and founded See Forever Foundation and the Maya Angelou Public Charter School, which work to create learning communities in lower income urban areas where all students, particularly those who have not succeeded in traditional schools, can reach their potential. See Forever has spent the last 11 years building successful alternative educational programs for young people who have been court-involved, truant, or unsuccessful in traditional schools. The Maya schools have been very successful. This past year, 93 percent of its graduates were accepted into 4-year or 2-year colleges and universities. Research shows that they are outperforming their peers. Over 70 percent go on to college or postsecondary school (compared to less than 40 percent of students graduating from district public schools). **James Forman, Jr.** is also a Professor at Georgetown Law School, where he teaches and writes in the area of Criminal Procedure and Education Law and Policy. **David Domenici** is the principal of the

Maya Angelou Academy, the school located inside of New Beginnings, the District of Columbia's secure facility for youth who have been adjudicated delinquent. The Maya Angelou Academy is a part of See Forever's network of schools.

Fr. Jim Gartland, S.J., is the President of Cristo Rey Jesuit High School, a neighborhood school with the mission of offering the best college preparatory education available to the youth of the Pilsen/Little Village community of Chicago, for whom other private schools are not a financial option. Founded in 1996, Cristo Rey now educates more than 530 students each year with virtually all students accepted to at least one college. Today 82 percent of Cristo Rey graduates are currently attending or have completed college. Cristo Rey is increasingly receiving national recognition as a ground breaking model for urban education. In response to the success of Cristo Rey, the Cassin Educational Initiative Foundation and the Bill & Melinda Gates Foundation invested close to $30 million toward replicating this educational model around the United States. Currently, there are 24 schools throughout the country that are associated through the Cristo Rey Network and operate using the educational model named for the first Cristo Rey School in Chicago.

Khary Lazarre-White is the Executive Director and Co-Founder of The Brotherhood/Sister Sol Inc. (BHSS). Founded in 1995, BHSS provides comprehensive, holistic and long-term support services to youth in Harlem who range in age from six to

eighteen, focusing on leadership development, educational achievement, bias reduction, sexual responsibility, sexism and misogyny, political education and social justice, Pan African and Latino History, and global awareness. Among the many services BHSS provides to youth in the community are school and home counseling, job training, college preparation, employment opportunities, and activist training. BHSS publishes assorted curricula and collections of youth writings and trains educators throughout the nation. One of the founding tenets of BHSS is that every young person can be reached and can change the course of his or her life through proper guidance and support, opportunities and resources, and through education and learned discipline. The Brotherhood/Sister Sol has earned national recognition, receiving awards that include Oprah Winfrey's Angel Network Use Your Life Award, Ford Foundation's Leadership for a Changing World Award, and the Exemplary Advocacy Organization Award from the New York State Department of Education.

Dr. Peter E. Leone is a Professor of Special Education, at the University of Maryland, College of Education, and specializes in Behavior Disorders. His experience includes direct service to troubled youth as well as field-based research which examines the multidimensional problems associated with behavior disorders. Dr. Leone points to the role of environmental and cultural factors in the inception of behavior disorders and believes educators need to take a multidisciplinary approach when implementing

programs for troubled or troubling youth. Dr Leone's research interests focus on program environments for troubled youth, educational entitlements of incarcerated youth, and policy studies. He directs The National Center on Education, Disability, and Juvenile Justice, a research, training and technical assistance project funded by the U.S. Department of Education. Dr. Leone has had numerous articles published in professional journals and has made many presentations at national, state, and local conferences on topics related to the effective treatment and instruction of behaviorally disordered youth.

Dr. M. Ann Levett is the Executive Director of the School Development Program at the Yale University Child Study Center. The Yale Child Study Center is a department at Yale University School of Medicine that brings together multiple disciplines to further the understanding of the problems confronted by children and families. Among the many disciplines involved in the Child Study Center are child psychiatry, pediatrics, genetics, neurobiology, epidemiology, psychology, nursing, social work and social policy. The mission of the Center is to understand child development, social, behavioral, and emotional adjustment, and psychiatric disorders and to help children and families in need of care. Housed within the Child Study Center is the School Development Program (SDP), the organization charged with implementing in school communities, the Comer Process, a school and system-wide intervention formulated by Dr.

James P. Comer, Maurice Falk Professor of Child Psychiatry at the Yale University School of Medicine's Child Study Center. The SDP aims to bridge child psychiatry and education by focusing on the six developmental pathways along which children mature – physical, cognitive, psychological, language, social, and ethical.

Dianne Morales is the Executive Director of The Door. The Door is an organization in New York City that serves over 11,000 young people each year by empowering them to reach their potential by providing comprehensive youth development services in a diverse and caring environment. Founded in 1972 to address the acute crisis affecting America's urban adolescent population, The Door employs a holistic approach that helps each individual member to dismantle the complex barriers that often stand in the way of success. Among its many services, The Door provides primary health care, health education, mental health counseling, legal services, GED, ESL, tutoring and homework help, college preparation and computer classes, career development services and training, job placement, daily meals, arts, sports and recreational activities.

Dr. Pedro Noguera is a professor in the Steinhardt School of Culture, Education, and Human Development at New York University. He is also the Executive Director of the Metropolitan Center for Urban Education and the co-Director of the Institute for the study of Globalization and Education in Metropoiitan Settings. An urban sociologist, Dr.

Noguera's scholarship and research focus on the ways in which schools are influenced by social and economic conditions in the urban environment. Dr. Noguera has served as an advisor to and engaged in collaborative research with numerous large urban school districts throughout the United States.

Sharon Olken is the Principal of the Gateway High School in San Francisco, a model college preparatory charter school committed to academic excellence through personalized, student-centered learning. At the core of the Gateway philosophy is an individualized approach to teaching and learning that fosters an environment for each student to reach his or her potential. The Gateway curricular program aims to prepare students for academic excellence in college and for lives which demonstrate integrity, responsibility, intellectual curiosity, and respect for a culturally diverse world. Gateway is particularly committed to providing high quality college preparation for students with diagnosed disabilities and to ensuring that its diverse student body includes at-risk students facing the insidious obstacle of childhood poverty. Due to Gateway's rigorous curriculum, personalized, student-centered learning, and intensive social and emotional support, 95 percent of its graduates attend college compared with a district-wide 77 percent. In 2009, *Newsweek* named Gateway one of its "top U.S. High Schools."

Christine Pahigian is the Executive Director of Friends of Island Academy (FOIA). FOIA is a community-focused organization that works with

youth, primarily ages 15 to 19 coming home from jail and/or detention in New York City. The organization seeks to re-integrate these youth and prevent them from re-entering the system. FOIA reaches out to youth prior to their release from Rikers Island and upon discharge, provides them with job training, counseling, education, mentoring, and youth leadership development to help participants stay out of trouble, take responsibility for themselves, and work to rebuild their lives. Founded in 1990, FOIA evolved from the conviction that with intense support and access to opportunity, many young people could be saved from a life of recurrent criminal behavior.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JUL 23 2009
OFFICE OF THE CLERK

Nos. 08-7412 and 08-7621

IN THE
Supreme Court of the United States

TERRANCE JAMAR GRAHAM
Petitioner,

v.

FLORIDA
Respondent.

JOE HARRIS SULLIVAN
Petitioner,

v.

FLORIDA
Respondent.

On Writs of Certiorari from the District Court of Appeal of Florida, First District

BRIEF OF FORMER JUVENILE OFFENDERS CHARLES S. DUTTON, FORMER SEN. ALAN K. SIMPSON, R. DWAYNE BETTS, LUIS RODRIGUEZ, TERRY K. RAY, T.J. PARSELL, AND ISHMAEL BEAH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

DAVID W. DEBRUIN*
Counsel of Record
JONATHAN F. OLIN
ERIC R. HAREN
NICHOLAS O. STEPHANOPOULOS
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000

Attorneys for Amici Curiae

July 23, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THIS COURT HAS RECOGNIZED THAT YOUTHFUL OFFENDERS ARE INHERENTLY DIFFERENT 4

II. THE LIFE STORIES OF THE *AMICI* SHOW THAT YOUTHFUL OFFENDERS ARE INHERENTLY DIFFERENT AND THAT INCARCERATING A YOUTHFUL OFFENDER FOR LIFE WITHOUT PAROLE CAN BE A TREMENDOUS LOSS TO SOCIETY 7

A. Charles S. Dutton 7

B. Senator Alan K. Simpson 11

C. R. Dwayne Betts 15

D. Luis Rodriguez 19

E. Terry K. Ray 21

F. T.J. Parsell 23

G. Ishmael Beah 27

CONCLUSION 32

TABLE OF AUTHORITIES

CASES

Kennedy v. Louisiana, 128 S. Ct. 2641 (2008), *modified on denial of reh'g*, 129 S. Ct. 1 (2008) 5

Roper v. Simmons, 543 U.S. 551 (2005) 3, 4, 5, 6

Thompson v. Oklahoma, 487 U.S. 815 (1988) 5

Trop v. Dulles, 356 U.S. 86 (1958) 32

STATUTES

18 U.S.C. § 844(f)(1) 12

18 U.S.C. § 844(f)(3) 12

Mich. Comp. Laws § 750.356 24

Mich. Comp. Laws § 750.529 24

OTHER AUTHORITIES

Ishmael Beah, *A Long Way Gone* (2007) 8

Ernest Hooper, *After Jail, Arts Pave Way Back Into Life*, St. Petersburg Times, Sept. 14, 2007, *available at* http://www.sptimes.com/2007/09/14/Columns/After_jail__arts_pave.shtml 8

Lonnae O'Neal Parker, *From Inmate to Mentor, Through Power of Books*, Wash. Post, Oct. 2, 2006, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/10/01/AR2006100101160.html 8

T.J. Parsell, *FISH: A Memoir of a Boy in a Man's Prison* (2006) 8

Second Chances: 100 Years of the Children's Court: Giving Kids a Chance To Make a Better Choice (Justice Policy Inst. & Children & Family Law Ctr., 1999), *available at* http://www.cjcj.org/files/secondchances.pdf 8, 31

Mike Sonksen, *The Redeemer Speaks*, O.C. Weekly, Dec. 1, 2005, *available at* http://www.ocweekly.com/2005-12-01/culture/the-redeemer-speaks// 8

INTEREST OF *AMICI CURIAE*[1]

The *Amici* who submit this brief are former juvenile offenders who were able to become productive, law-abiding adults and make meaningful contributions to society. *Amici* believe that their experiences may assist the Court in resolving the difficult issues presented by these cases by providing insight into the unique capacity of children to rehabilitate themselves.

As juveniles, *Amici* in many ways resembled Joe Harris Sullivan and Terrance Jamar Graham, the petitioners in this case. Each of them engaged in serious criminal conduct. Some of them were convicted of crimes that, in Florida and elsewhere, are punishable today by life sentences. Others committed acts that quite easily could have led to such a conviction had circumstances been different or had a prosecutor taken a harder line.

Yet because *Amici* were not sentenced to life imprisonment – because they ultimately were given another chance, in part because of the young age at which they had committed criminal offenses – they were able to make significant contributions to their communities and even, in some cases, the nation and the world. The life stories of the *Amici* show how much could have been lost by concluding too quickly

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

that they were beyond hope. *Amici* seek to share their individual stories with the Court.

Charles S. Dutton attended Yale University's School of Drama. He made his Broadway debut in 1984 and has received two Tony nominations. He also has starred in several major motion pictures and a television series, and won an Emmy for directing the HBO mini-series "The Corner."

Alan K. Simpson served in the United States Senate from 1979 to 1997, serving, among other positions, as Republican Whip and Chairman of the Veterans Affairs Committee. He has also served several terms in the Wyoming legislature, directed Harvard University's Institute of Politics, and participated in the Iraq Study Group.

R. Dwayne Betts is a published author and poet. He recently graduated from the University of Maryland, College Park, where he was selected for the honor of delivering a commencement address.

Luis Rodriguez is an acclaimed writer, activist, and poet. He has published fourteen books, including his memoir, *Always Running: La Vida Loca, Gang Days in L.A.*, which has won numerous awards. He has also published articles in leading newspapers, and he founded Youth Struggling for Survival, a community organization for troubled youths in Chicago.

Terry K. Ray attended Luther College and the Northwestern University School of Law. He has served as a trial attorney for the Department of Justice Tax Division and as an Assistant United States Attorney, prosecuting tax crimes. Today he is a white-collar defense attorney in Dallas. He has participated in and initiated mock trials at inner city

schools and received a grant from the State of Illinois to teach youngsters in the Venice School District how to resolve conflicts without resorting to violence.

T.J. Parsell is a successful software executive and one of the country's leading advocates against prison rape. He authored a book about his experiences in prison, *FISH: A Memoir of a Boy in a Man's Prison*, which was published in 2006. This fall he will enter the graduate film school at New York University.

Ishmael Beah is a United Nations Children's Fund (UNICEF) Advocate for Children Affected by War. He speaks at conferences on children's welfare around the world. A graduate of Oberlin College, he has written a memoir, *A Long Way Gone*, which has become an international best-seller.

Although they are now successful adults, *Amici* made terrible mistakes as teenagers. They are living, breathing testaments to the resiliency, adaptability, and rehabilitative potential of juvenile offenders.

SUMMARY OF ARGUMENT

As the experiences of *Amici* show, it is fundamentally inhumane to give up on a youthful offender. The same distinctive characteristics of youth that render capital punishment unconstitutional for juvenile offenders make it equally improper to sentence them to life in prison without the possibility of parole. As this Court recognized in *Roper v. Simmons*, 543 U.S. 551 (2005), children are less susceptible to deterrence, less deserving of retribution, and, crucially, much more capable of rehabilitation. Like a death sentence, a

sentence of life in prison without the possibility of parole ignores these important differences between adults and children.

As individuals who committed serious criminal offenses as juveniles but who subsequently have realized their mistakes, atoned for them, and rehabilitated themselves, *Amici* are uniquely situated to provide insight into the difficult issues presented in these cases. One of the *Amici* has helped to enforce the laws of the United States; another helped to write them. Others have made important national and even international contributions to social justice, culture and the arts, and business. Their stories, and the stories of others like them, prove that no matter how broken their spirit, nor how violent their actions, juveniles can be redeemed and can make contributions to society that would be tragic to lose. It is impossible to know what any juvenile offender will grow up to become. But it is also impossible to conclude that any juvenile offender has no redeeming potential, and therefore should be locked away for life with no possibility of parole. Although *Amici* come from a variety of backgrounds, each of them understands firsthand and proves the limitless potential of young people to change. They speak today with one voice and urge this Court to rule in Petitioners' favor in these cases.

ARGUMENT

I. THIS COURT HAS RECOGNIZED THAT YOUTHFUL OFFENDERS ARE INHERENTLY DIFFERENT.

This Court has repeatedly endorsed the view that juveniles are "categorically less culpable than

the average criminal." *Roper*, 543 U.S. at 567 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)); *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion). In *Roper*, the Court pointed to three "general differences" between juveniles and adults that "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." 543 U.S. at 569-70. First, juveniles' immaturity and susceptibility to irresponsible behavior makes their irresponsible conduct less morally reprehensible than that of adults. *Id.* Second, juveniles are more vulnerable to negative environmental influences and pressures, including peer pressure. *Id.* at 569. This vulnerability, combined with a relative lack of control over their immediate surroundings, allows greater forgiveness to juveniles for bad behavior. *Id.* at 570. Finally, juvenile personalities are not fully developed. The signature qualities of youth are transient, leaving open the possibility of maturity and personal growth. *Id.* at 569-70.

This Court has also explained that punishments are justified under one or more of three principal rationales: retribution, deterrence, and rehabilitation. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008), *modified on denial of reh'g*, 129 S. Ct. 1 (2008). In *Roper*, this Court recognized that the first two of these justifications apply to juveniles "with lesser force" than to adults. 543 U.S. at 571. The case for retribution is less strong for a minor because the culpability and blameworthiness of juveniles is significantly diminished by their youth and immaturity. *Id.* These same characteristics also

suggest that juveniles will be "less susceptible to deterrence." *Id.*

The third justification for punishment – rehabilitation – is of course not applicable to a sentence of life imprisonment without parole, just as it does not apply to the death penalty. Yet the same characteristics that decrease the culpability of juveniles and make them less susceptible to deterrence increase their prospects for rehabilitation. As the Court noted in *Roper*, the reality that juveniles are still in the process of defining their identity diminishes the presumption that a heinous crime is evidence of irretrievably depraved character. *Id.* at 570. It would be misguided to equate the failings of a minor with those of an adult, "for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.* The incredible potential for such reformation is the focus of this brief.

When a juvenile offender commits a serious criminal offense, the State retains authority to take basic liberties away from that offender. *Id.* at 573-74. What the State cannot do, however, is to "extinguish his life and his potential to attain a mature understanding of his own humanity." *Id.* This brief provides examples of the important contributions that can be made by youth when they are given a second chance – the chance to attain a mature understanding of their own humanity, and to share it.

These examples are necessarily anecdotal. Undoubtedly there are many more former juvenile offenders with stories like those of the *Amici*, just as there are others who do *not* go on to become

Senators, authors, and human rights activists. However, the examples set forth in this Brief do dramatically illustrate that the goals of rehabilitation, deterrence, and retribution are *not* served by sentencing juveniles to life in prison without parole. Had the *Amici* received such sentences, they never would have had the opportunity to discover and cultivate their impressive talents, and society never would have benefited from their undeniable contributions.[2]

II. THE LIFE STORIES OF THE *AMICI* SHOW THAT YOUTHFUL OFFENDERS ARE INHERENTLY DIFFERENT AND THAT INCARCERATING A YOUTHFUL OFFENDER FOR LIFE WITHOUT PAROLE CAN BE A TREMENDOUS LOSS TO SOCIETY.

A. Charles S. Dutton

Charles S. Dutton is one of the nation's most respected actors and directors. He has received two Tony Award nominations for his performances on the Broadway stage and has been honored with Emmy Awards for his acting and directing on television.

---

[2] *Amici* do not condone in any way the crimes committed by the petitioners in the cases before the Court. Nor are *Amici* in a position to evaluate the appropriate criminal sanctions that these particular defendants, or any other defendants convicted of serious offenses, should receive for their crimes. Strong criminal sanctions, including lengthy periods of incarceration, often are appropriate for individuals who have committed serious criminal offenses. However, *Amici* also strongly believe that when a juvenile commits a crime, even a serious offense, a constitutional system of justice cannot conclude that no possibility of rehabilitation exists and that the only recourse is a term of life imprisonment without the possibility of parole.

Yet his path to success did not begin at the Yale School of Drama, from which he earned his Masters of Fine Arts degree, but years earlier, during his third and final stint in Maryland State Prison.

Dutton grew up in the Latrobe Homes housing projects in Baltimore. His childhood bedroom overlooked the Maryland Penitentiary, an imposing and dark gothic structure built in the early 1800s. Dutton saw that prison every day and night from birth. "We all expected to end up there," he says, "because all the older guys we knew were there. It was as if I was born for it."[3]

Dutton was first sent to a juvenile reform school when he was thirteen, and he bounced around the juvenile system for several years. "I thought there

---

[3] *Amici* speak directly to the Court in this Brief, and each adopts the statements attributed to him herein as his own. However, the stories of the *Amici* have been told before in a wide spectrum of public media. *See, e.g.*, Ishmael Beah, *A Long Way Gone* (2007) (Ishmael Beah); Ernest Hooper, *After Jail, Arts Pave Way Back Into Life*, St. Petersburg Times, Sept. 14, 2007, *available at* http://www.sptimes.com/2007/09/14/Columns/After_jail__arts_pave.shtml (Charles Dutton); *Second Chances: 100 Years of the Children's Court: Giving Kids a Chance to Make a Better Choice* at 35, 41 (Justice Policy Institute & Children and Family Justice Center, 1999), *available at* http://www.cjcj.org/files/secondchances.pdf (Alan Simpson and Terry Ray); T.J. Parsell, *FISH: A Memoir of a Boy in a Man's Prison* (2006) (T.J. Parsell); Lonnae O'Neal Parker, *From Inmate to Mentor, Through Power of Books*, Wash. Post, Oct. 2, 2006, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/10/01/AR2006100101160.html (Dwayne Betts); Mike Sonksen, *The Redeemer Speaks*, O.C. Weekly, Dec. 1, 2005, *available at* http://www.ocweekly.com/2005-12-01/culture/the-redeemer-speaks/ (Luis Rodriguez).

was more going on in the street corner than in the classroom." In order to look "tough" to his cohorts, Dutton felt the need to be imprisoned in more and more severe establishments, in what he describes as a "morbid rite of passage." "You gained 'rep' by being tough. If you were in City Jail, people would say, 'you ain't tough. You need to go to the Farm, or the Cut," slang for other Maryland detention facilities. "You ain't done nothin'."

When he was seventeen, Dutton was involved in a street fight that escalated into a knife fight. He and his assailant stabbed each other. Only Dutton survived. He was convicted of manslaughter and sentenced to five years of imprisonment. Dutton was out on parole for only a few months when he returned to prison for possession of a deadly weapon (a handgun). When a prison riot broke out, Dutton participated and punched a guard. He was sentenced to an additional eight years of imprisonment. "I knew what I was doing," he says. "For a long time I didn't want to hear anything positive. I just wanted to know when we were going to burn down the prison."

In 1974, during his last prison stint, Dutton was put in the "hole" – solitary confinement – for refusing to clean toilets. He was fed only every seventy-two hours. "The only thing you were allowed to bring with you into the hole was one book. I brought in an anthology of plays that my girlfriend sent me from the outside. I had meant to grab a different book, actually, but took the plays by mistake," he says. "For the first three days, I couldn't read it. The hunger hurt too badly. But after that, by the light that shone through the two inches between the door

and the floor, I lay flat on my stomach and read for days." One play in the anthology was *A Day of Absence* by the famous African-American playwright Douglas Turner Ward. "Reading that play sparked me in a way that allowed me to rediscover my own humanity," Dutton recalls.

When Dutton left "the hole," he convinced the warden and a prison teacher, who was also a local actress, to start a prison drama program. Preparing for the group's weekly meetings and rehearsals gave him purpose. While in prison, he received his G.E.D. and then an Associate's Degree in theater. After his release, he earned a Bachelor's Degree in theater from Towson State University and acted for two years in Baltimore. He applied and was accepted to Yale University's School of Drama – one of the top drama schools in the country. "When I used to wander the campus at night, looking at the buildings and statues, I used to think, 'wow, I don't believe this.' I have that same feeling today when I shoot a film or perform on a Broadway stage."

Dutton made his Broadway debut in 1984 in August Wilson's "Ma Rainey's Black Bottom," a performance that earned him a Theater World award and the first of his two Tony nominations. In 1991, Towson State University bestowed him with an honorary doctorate degree. Dutton has co-starred in several major motion pictures, and from 1991-1994 starred in the television series "Roc." In 2000, Dutton earned an Emmy Award for directing the acclaimed HBO mini-series "The Corner."

Dutton emphasizes that his redemption is not unusual. "I have buddies who are plumbers and brick masons and carpenters who've been out as long

as I've been out and been as productive with their lives," he says. He firmly believes the chance for a productive life is at its height with juvenile offenders. "I just can't fathom sentencing juveniles to life without parole," Dutton says. "I just talked in Florida to some kids with that sentence. It was just dawning on them after ten or twelve years that their lives were over. They were kids and now they're finished. There's a heart-wrenching sadness on their faces, and you can see the fight is out of them. If they were given a second chance, they'd be changed human beings."

"As long as it's a young mind," he says, "they're salvageable. At those tender ages, the mind is still pliable and can be shaped. It's not too late."

B. Senator Alan K. Simpson

Alan K. Simpson is an accomplished former Member of the United States Senate and a leader of the Republican Party. He served in the Senate for eighteen years, from 1979 to 1997, rising to become the Republican Whip. When Simpson announced his candidacy for the Senate in 1977, one man stood out in the crowd: J.B. Mosley, Simpson's probation officer. When Simpson was a juvenile – long before he finished college, law school, and eventually became a candidate for the Senate – Simpson was convicted of a serious federal offense and engaged in other conduct that could have led to other serious criminal offenses and, under certain regimes, a potential life sentence. In Simpson's words to this Court, "I was a monster."

One day in Cody, Wyoming, when Simpson was in high school, he and some friends "went out to do

damage." They went to an abandoned war relocation structure and decided to "torch" it. They committed arson on federal property, a crime now punishable by up to twenty years in prison if no one is hurt, *see* 18 U.S.C. § 844(f)(1), and punishable by up to life in prison if the arson causes a person's death, *see id.* § 844(f)(3). Luckily for Simpson, no one was injured in the blaze.

Simpson not only played with fire, but also with guns. He played a game with his friends in which they shot at rocks close to one another, at times using bullets they stole from the local hardware store. The goal of the game was to come as close as possible to striking someone without actually doing so. Again, Simpson was lucky: no one was killed or seriously injured.

Simpson and his friends went shooting throughout their community. They fired their rifles at mailboxes, blowing holes in several and killing a cow. They fired their weapons at a road grader. "We just raised hell," Simpson says. Federal authorities charged Simpson with destroying government property and Simpson pleaded guilty. He received two years of probation and was required to make restitution from his own funds – funds that he was supposed to obtain by holding down a job.

J.B. Mosley became Simpson's probation officer. Simpson resisted Mosley's efforts, earning money at the local pool hall and reporting to Mosley (sarcastically) that he was going to "choir practice." One late night in Laramie, Simpson arrived at a bar popular with African-Americans. He saw a man leaving the bar who had just been in a knife fight inside. Simpson asked what happened. The man

uttered racial slurs, and Simpson responded that, with that attitude, the man was at the wrong bar. The man attacked Simpson and Simpson shoved the man down – just as the police arrived.

The police separated the men and, believing Simpson was responsible for the man's knife wounds, attempted to arrest Simpson. In his words, Simpson then "belted the cop" who was holding him. The officer responded by striking Simpson in the head with a billy club. As Simpson reports, "I still carry a lovely little crescent above my eyebrow as a reminder of how stupid one can get." The officers arrested Simpson and locked him up. His girlfriend (and now wife of fifty-five years) refused to bail him out. Simpson spent the night in a "sea of puke and urine."

For Simpson, that night triggered what he describes as "creeping maturity" – a resolve that he would avoid further trouble with the law and become a productive member of society. As he has described it, "The older you get, the more you realize . . . your own attitude is stupefying, and arrogant, and cocky, and a miserable way to live." With the help of Probation Officer Mosley, Simpson began to redeem himself.

Simpson went on to graduate from the University of Wyoming with a Bachelor of Science degree in 1954 and a law degree in 1958. He served in the United States Army from 1954 to 1956, in various state-level attorney positions from 1958 to 1959, as a United States Commissioner from 1959 to 1969, as a private attorney for many years, and as a member of the Wyoming House of Representatives from 1965 to 1977. He and his wife Ann also raised three children.

Simpson was elected to the United States Senate in 1978. During his tenure, he served as Republican Whip from 1984 to 1994, and he was considered as a potential candidate for Vice President in 1988. He served principally as Chairman of the Senate Veterans Affairs Committee, and also held many other posts in the Senate.

Simpson declined to run for reelection in 1996 and went on to teach at and later to direct the Institute of Politics at Harvard University's John F. Kennedy School of Government. In 2006, he was a member of the Iraq Study Group. He has been an outspoken advocate for equality for all persons regardless of race, color, creed, gender, or sexual orientation. Among many other honors, Simpson has received Honorary Doctor of Laws degrees from the University of Wyoming, Notre Dame, and American University, as well as the Thomas Jefferson Award in Law at the University of Virginia.

Alan Simpson was involved in activities as a youth that could have led to a lengthy prison term. He engaged in felonious and violent conduct that posed a serious risk to life and property. Had circumstances been different – had he not been fortunate regarding where his stolen bullets struck or what was damaged by his arson – he might have been jailed for the rest of his life. But the system did not treat him so harshly. It gave him a second chance, including the help of a probation officer who, in Simpson's view, had a great influence on his life and helped him make it to the moment where he stood before a crowd in Wyoming, asking to be elected to the United States Senate.

C. R. Dwayne Betts

On May 21, 2009, Reginald Dwayne Betts became his family's first college graduate when he received his bachelor's degree in English from the University of Maryland. He had the honor of being chosen to give a commencement address at graduation. Standing before thousands of spectators and his fellow graduates, Betts recalled a day twelve years earlier when he stood as a teenager in a Virginia courtroom and was sentenced to prison. "My journey," Betts said, "began the moment my life became a derailed train headed toward the state penitentiary."

In 1997, sixteen-year-old Betts and a friend took a joyride in a stolen car. They came across a man asleep in his car near a Northern Virginia shopping mall and decided to carjack the man. Betts had a gun. He pointed it at the car window, stole the man's wallet, and drove off with the car. Betts was arrested the next day. Asked later about his motivations, Betts said, "I did it for all kinds of reasons I can't clearly reason out. At that moment I wanted to do it, and I had no idea that it would define me for the rest of my life."

Betts was convicted of carjacking, use of a firearm during a felony, and attempted robbery. Although he had never before been arrested, he was certified as an adult. He faced a possible life sentence, but was sentenced to fifteen years for carjacking, five years for attempted robbery and three years for the use of a firearm in the commission of a felony. After the judge suspended all but six years of the fifteen-year sentence, and ran

it concurrently with the five-year robbery sentence, Betts was left facing a nine-year prison sentence. He recalls the judge saying, "I'm under no illusions that sending you to prison will help you."

Prior to his arrest, Betts had drifted between his school life and his social life. An avid reader, he qualified for his school's gifted program, made the honor roll, and was elected class treasurer. But Betts was restless and, as his mother noted, thought he could talk his way out of anything. His group of friends consisted of boys who were mainly failing, so Betts hid his college potential and aspirations. Although he remained on the honor roll and excelled in his honors classes, Betts began to get into trouble. He started getting high with the boys in his neighborhood after school. Over time, his drug use increased and he began cutting classes. Nevertheless, his mother and teachers did not notice his downward spiral, because he continued to excel in class. Looking back, Betts says, "I guess I didn't set off any alarms in anybody's head."

After his arrest, Betts "closed my eyes hoping it would go away." But of course it did not, and he soon realized he would remain locked up for a long time. He spent the rest of his adolescent years trying to maintain his sanity and sense of self, living in a prison environment ruled by violence. In that world, Betts learned, "you are either predator or prey." During his first two years in prison, Betts spent almost a full year in solitary confinement for what he calls "incidental contact with correctional officers." Although solitary protected Betts from the danger of always being the youngest person in the room, his constant fears of violence gave way to a worry that

prison would harden him, would turn him into someone he knew he was not.

As he had done as a child, Betts escaped into books. He began writing as well to pass the time. He wrote to his mother every week, and he started writing essays and poetry. Betts knew that one day he would be released back into society, and he did not want to have wasted the years he was incarcerated. He knew he needed a skill once he was released from prison, and he focused on writing. "I took everything seriously because I knew I had a release date," he says. "I wrote my way out of that world."

Betts says that "if I had gotten life without parole, I would never have written those poems and essays." There is an "absolute loss of hope" for juveniles sentenced to life in prison, and "no push to do anything at all." Betts met several such inmates while in jail, and none of them tried to develop skills or improve themselves. Instead they became "part of that world, predator or prey," uninterested in doing anything constructive with their lives.

Betts now has been out of prison for four years. He is making the most of his second chance. "Prison gave me a skill to market, and a story to tell," he says. "I had seventeen hours a day for nine years just to read, study, and exercise – all to prepare for my release." Since his release, Betts has proved he can be a productive member of society. He is, indeed, "not the person I was when I was locked up."

After his release, Betts enrolled at Prince George's Community College. He served in the student government, was the Phi Theta Kappa honor society president, and edited the college's literary

journal. His grades earned him a spot in the school's Honors Academy and a full tuition scholarship to attend the University of Maryland. "The reason why I'm here today is because there were a number of people willing to give me a chance, who were willing to say 'no' to the voices that said I wasn't good enough," Betts has said. "To say 'no' to the voices that said I didn't deserve a chance."

His poetry has been published in several national magazines and journals, and he has won a number of writing contests and scholarships, including the Breadloaf Writer's Conference scholarship and a Holden Fellowship to attend the graduate program at Warren Wilson College. Later this year, Betts will publish a memoir, "A Question of Freedom," as well as a book of poetry. He is married and has a child.

Betts also has worked to give back to his community. At Karibu Books in Bowie, Maryland, Betts started a book club for young boys, to provide a space where the boys could read and share their thoughts about literature and life. Betts wanted to provide the boys with the kind of role model that he never had, so that they could avoid the mistakes he made. Betts also teaches poetry workshops for middle school students in Washington, D.C., as part of the D.C. Creative Writing Workshop.

Betts is remorseful for his actions and grateful for the opportunity to prove that he is not a criminal at heart, not a menace to society. "I made one mistake," he says. "It was not the sum total of who I was." He knows how fortunate he is to have this second chance. "It's difficult to see, right after trouble, that someone is deserving of an

opportunity," he says. "People are dying from the lack of opportunity every day. I'm very blessed."

Knowing that he would have another chance – that he had a release date – is what motivated Betts to work hard to prepare for life after prison. "I always knew I'd have this day, standing on a porch, looking outside," he muses. "Without that, there would just be no reason to think about life beyond a jail cell."

D. Luis Rodriguez

Luis Rodriguez was stealing things by the time he was seven years old, and at the age of eleven, he joined Las Lomas, a Los Angeles gang. As a teenager, Rodriguez says, "I was destructive and self-destructive. I was willing to shoot, stab and even kill for the gang – and I was willing to die for the gang as well. My world was extremely limited and I ended up becoming small to fit in this world."

Beginning when he was thirteen years old, Rodriguez repeatedly was arrested for stealing, fighting and disturbing the peace. He also became addicted to drugs. By age fifteen, Rodriguez had been expelled from school and thrown out of his house by his mother.

When Rodriguez was seventeen, a member of his gang was assaulted by a neighborhood club of white bikers. Rodriguez, deeply ensconced in gang culture, addicted to heroin, and seeking retaliation, shot one of the bikers. He was arrested as he fled the scene and was charged with assault with the intent to commit murder. Although those charges were dropped, a year later Rodriguez faced a six-year prison sentence for assaulting a police officer and

resisting arrest. Instead of giving up on him, the criminal justice system – based partly on letters of support from community members – gave him another chance, directing him to a county jail based on a lesser conviction.

Rodriguez has spent his life paying back the second chance he was given and doing so in spades. At nineteen, Rodriguez broke free of his drug addiction and took a series of low-skill jobs. Over the next four years he worked at Bethlehem Steel, with various periods spent as a carpenter, mechanic, foundry smelter, paper mill worker, and truck and school bus driver. He went back to complete high school, and after taking night classes at East L.A. Community College worked as a reporter and photographer for local weekly newspapers. He subsequently was accepted into a summer program for minority journalists at Berkeley, and at the age of twenty-six was hired as a daily reporter for the *San Bernardino Sun.*

Today, Rodriguez is an acclaimed writer, activist, and poet. He has published fourteen books of fiction, nonfiction, literature, and poetry. In 1993, Rodriguez wrote his memoir and signature work *Always Running: La Vida Loca, Gang Days in L.A.*, which he dedicated to twenty-five close friends who died during his gang days. The book, intended to steer Rodriguez's son away from gang life, has sold more than 300,000 copies, and received numerous accolades, including being named a *New York Times* Notable Book, and receiving the Carl Sandburg Literary Award and a *Chicago Sun-Times* Book Award. His freelance journalism has appeared in *U.S. News & World Report, The Chicago Tribune,*

The L.A. Times, and *The New York Times*. Rodriguez also has appeared on National Public Radio, the Oprah Winfrey Show, Good Morning America, CNN, BBC, Fox TV News, and Jim Lehrer's NewsHour.

Returning full circle, in 1994 Rodriguez helped found Youth Struggling for Survival, a community organization that works with gang and non-gang youth in Chicago. He believes that "if properly seen, mentored, assisted, guided, and initiated, young people have immense capacities for change and transcendence. I have seen this in the work I do with gang and other troubled youth, as well as in my own teen years when I left the gang and drugs, including heroin." Today, he testifies as a gang expert and has filed affidavits and appeared in over fifty cases. Rodriguez also spends time speaking in juvenile facilities, prisons, homeless shelters, and detention centers. He says, "Adults today give up on youth when the going gets rough. Youth is youth for a good reason. Youth are very malleable and it is society's obligation to try to change them. I am living proof of the capacity for change."

E. Terry K. Ray

In 1961, eleven-year-old Terry Ray entered Chicago's primary juvenile detention center, the Audy Home, after injuring a friend during a neighborhood rock fight. Ray had regularly been abused at home. Over the years that followed, Ray's anger swelled and he committed a series of increasingly violent offenses.

As a youth, Ray bore all the hallmarks of an incorrigible, recidivist violent criminal. He

repeatedly fought with other students, at times responding with extreme violence to the slightest provocation. At age eleven, he stabbed a classmate in the leg with scissors, and then stabbed the teacher who tried to break up the fight. He attached a combination lock to a metal chain and then pummeled another student with it. One day when he was sixteen, he marched toward his school with a gun, intending to attack a teacher. An alert police officer intercepted Ray, beating him severely. "I was a very violent young man," Ray says. "I was a very angry young man."

Ray spent his teen years drifting in and out of the juvenile justice system. For Ray, incarceration meant stability and safety. It meant protection from the abuse he faced at home. He explains, "I felt much, much better locked up than on the streets. The food was better. The living conditions were better. I had friends."

After his final release from juvenile detention, Ray enrolled in a junior college and took a job as an orderly at a local hospital. One counselor at the college recognized that he had significant academic potential and encouraged him to avoid further trouble by leaving Chicago to complete his education. Ray listened, transferring to and eventually graduating with honors from Iowa's Luther College. He then attended Northwestern University School of Law. After graduating, Ray earned a Master of Legal Letters degree in taxation from Washington University School of Law.

Despite these degrees, Ray initially had trouble finding a job. After he had worked for fourteen months for an insurance company, two law school

professors helped him arrange for an interview with the Department of Justice Tax Division in Washington, D.C. Ray – who at one point had seemed destined to spend his adult life in and out of prison – became a trial attorney for the United States. He later became an Assistant United States Attorney, prosecuting street crime cases in Washington, D.C., and eventually was hired to lead the Tax Fraud Prosecution Unit in the U.S. Attorney's Office in Dallas, Texas. When he left that post in 1987, the Internal Revenue Service thanked him for his service by making him an honorary special agent.

Ray is now an attorney in private practice in Dallas. Throughout his career, he has reached out to juvenile offenders and at-risk youths, teaching them to resolve conflicts without resorting to violence. "Sometimes we don't take the time to look at someone as an individual," Ray says. "We look at something a person did in one second, five seconds, or ten minutes and say that the person has no possibility of ever overcoming that moment. But those people who make it out – they have an extra gear, and they can do remarkable things."

F. T.J. Parsell

T.J. Parsell is a successful software executive, author, and human rights activist. But after convictions for larceny and armed robbery as a juvenile, his life might have been quite different.

Parsell grew up in Michigan, raised by a family with a "long history of trouble." As he relates, "my grandfather, father, uncle, brother, and stepbrother all served time in a juvenile reform school or went to

prison." Parsell describes a family with "twisted ethics" – where it was almost expected that he would end up behind bars.

In 1978, Parsell was seventeen and worked at a hotel, and so he had keys to all of the guest rooms. He often invited friends to drink alcohol, party, and stay the night in the empty rooms. He even stole items from occupied rooms. He was caught and agreed to plead guilty in exchange for probation. The larceny charge could have carried a ten-year prison sentence. *See* Mich. Comp. Laws § 750.356. While out on bail for that offense, Parsell held up a Photo Mat with an imitation gun and stole money from the proprietor. Parsell was arrested the following day and charged with armed robbery, a crime for which he could have spent the rest of his life in prison. *See* Mich. Comp. Laws § 750.529.

The state courts sentenced Parsell as an adult to two-and-a-half to four years of imprisonment on the larceny charge (because Parsell already had violated any probation he might have been granted) and delayed sentencing on the armed robbery for several months. While in the county jail, awaiting assignment to a state prison, Parsell met with the prison psychologist who informed him that because he had not yet been sentenced for armed robbery, and because armed robbery could subject him to a life sentence, Parsell would be "going inside" – meaning "inside the walls of maximum security." After the psychologist noted that Parsell was "dangerous," Parsell was transferred to the Riverside Correctional Facility – "a close-custody prison for inmates serving long sentences, usually ten or more years."

Parsell was terrified. When he arrived at Riverside, he "felt a sudden urge to scream," but kept it hidden. "I could not let the other inmates see how the sight of the prison's massive walls hit me like I was entering a slaughterhouse." On his first day in the general population, an inmate spiked Parsell's drink with Thorazine, a powerful sedative. Parsell was dragged to a cell, where four inmates gang-raped him. They flipped a coin to see who would "own" him for the rest of his prison time. Only a few weeks earlier, Parsell was reading comic books at home. Now, after stealing property from a Photo Mat, Parsell was the property of another person: an inmate nicknamed Slide Step, who won the coin toss.

Parsell was then transferred back to county jail for sentencing on his armed-robbery charge. Here, outside of Slide Step's "protection," Parsell was gang-raped even more brutally than he had been at Riverside. When the probation officer preparing his presentence report made a sexual advance, Parsell rebuffed it. He then received a harsh sentencing recommendation, and the judge sentenced him to four-and-a-half to fifteen years in prison.

Parsell was transferred to a medium-security facility called the Michigan Training Unit, which stressed rehabilitation. It helped Parsell turn his life around. "The school and the library became my sanctuaries," he reports. A woman named Miss Burt, the classification director, was starting a prison newspaper. "She brought her passion for making a difference to the position, and so she stood out," he recounts. "She was like an angel." Simply by calling Parsell by his first name (Tim), she made him "believe that I was human again." As he recalls,

"what a difference it made to be treated with dignity in a place that didn't seem to value it much."

Parsell wrote for the prison newspaper – called the *Oracle*, because the inmates on the paper analogized Miss Burt to a priestess "through whom a deity is believed to speak." Recounting Miss Burt's impact, Parsell says: "Here was this woman, a black woman in a man's world, who was better educated than anyone I'd ever known. She stuck up for me as my mother never had. Now that I was getting an education I was starting to understand what it meant not to have one." Finally, Parsell says, "I could see that through education there was possibility." Parsell completed his G.E.D. and twenty months of his college education in prison.

Parsell left prison in 1982. He took a typing job – "it was my only marketable skill" – and put himself through night school to complete his undergraduate degree. He graduated with honors from St. Francis College and went on to work in the software industry. "I got therapy, I got sober, and I started to do well." He went on to become a top executive at several technology firms, ultimately rising to become vice president of sales at a major publicly traded software company.

Following his brother's death and the September 11, 2001 terrorist attacks, Parsell made a decision to confront issues he long had repressed. "I felt extremely fortunate to have been able to transcend the mistakes of my earlier life." He decided to write and talk about his experiences in prison. His memoir, *FISH: A Memoir of a Boy in a Man's Prison* (Carrol & Graf), was published in 2006 and won the Pass Award for Literature by The National Council

on Crime and Delinquency. Since then, Parsell has become one of the nation's leading advocates against prison rape. He is president of the human rights group Stop Prisoner Rape. He worked with the Justice Department to set up the National Prison Rape Elimination Commission and with the Bureau of Justice Statistics and the National Institute of Corrections on various ways of quantifying and preventing prison rape. He helped produce an inmate orientation video, which is shown to all new incoming prisoners in the United States, outlining ways in which inmates can avoid prisoner rape.

This fall, Parsell will enter the graduate film school at New York University. He plans to turn his memoir into a feature film. Unsurprisingly, "being a poster child for prisoner rape was not high on my list of ambitions," Parsell says. "I'm taking back the voice that was stolen from me when I was seventeen years old. And I know that others, no matter how far down a wrong path they may have gone, or how far they've fallen, can do the same."

G. Ishmael Beah

Like the other *Amici*, Ishmael Beah is today a highly accomplished individual who is making the world a better place. His background is very different from the others, however, and far more extreme. In a foreign country, as a literal child-soldier in a militia army, Beah engaged in the atrocities of murder and torture. But his story equally illustrates the potential of youth to grow and change.

Today Beah is a best-selling author, a United Nations Children's Fund (UNICEF) Advocate for

Children Affected by War, and a member of the Human Rights Watch Children's Rights Division. He has devoted his adult life to advocating rehabilitation for children who have committed brutal acts, focusing on the amazing capacity of young people to transform their lives.

Beah grew up in Sierra Leone, and his home region was engulfed in warfare in his early teenage years. After the death of his family, he tried to flee to safety until he was forced to join the government army, as this became the only way to ensure his survival. He was initially reluctant to be a soldier, but rapidly became accustomed to the extreme violence that surrounded him. At age thirteen, he learned to fire a gun, to handle a bayonet, and to find motivation by focusing on his hatred for the rebel army, which had killed his family.

In the years after he enlisted, Beah aspired to be a fierce and deadly soldier, modeling himself after the Rambo movies. He practiced beheading rebels with a bayonet; he shot prisoners in their feet and kept them living for hours in excruciating pain before finally killing them; he led small bands of soldiers in massacring entire villages. When Beah was fifteen, UNICEF workers managed to get him out of the army – entirely against his will – and into a refugee camp. On his first night in the camp, as the UNICEF workers looked on in horror, Beah and other former child soldiers started a pitched battle of fists, grenades, and bayonets that eventually left six boys dead. As the UNICEF workers struggled to bring the boys back to some semblance of normalcy, the boys ripped apart furniture, walls, windows, and

anything else they could find, so inured had they become to a lifestyle of violence and ruin.

Looking back on that time now, Beah recognizes that the violence was a way to keep himself from thinking about what he and his family had suffered. But it was only the opportunity given to him by the UNICEF workers that allowed him to "discover himself" and realize that he could be more than a mindless agent of destruction. At the camp, UNICEF workers constantly told Beah that he had been just a boy when he committed his crimes, and that it wasn't his fault. After being given "time and space" to heal, Beah began to come to terms with what he had done as a teenager. He moved to the United States in 1998 and finished his last two years of high school at the United Nations International School in New York. In 2004, he graduated from Oberlin College with a Bachelor of Arts degree in political science. Within a few years, he was speaking at conferences on children's welfare all around the world. In 2007, he published the memoir *A Long Way Gone*, which has become an international best-seller.

Beah's time spent immersed in fighting and acts of criminality gives him a deep sympathy for other children trapped in a similar cycle of violence. Although the circumstances in America are very different from those in Africa, he believes that the forces that push people to criminal activity are fundamentally the same in both places. "Not every child who fights wants to be a child soldier," he explains. "Many have bad home lives and can fall victim to those who would pull them into a life of violence as a solution from their abuse or suffering."

Whether in Florida or Sierra Leone, violence or theft "becomes normalized because it becomes the only way to live." What children see, he believes, is what they will do.

Beah knows that there is no easy solution for juvenile crime, and that different methods are effective for different people. Still, he is certain that a lifetime in prison is not the answer: "There's more trauma in prison than what I'd been put through. Punitive measures for kids just don't help." If Beah had been in an American-style prison, he believes, he would have been left to "push myself into despair, wallowing in the trauma of what happened" instead of getting a chance to discover his own potential and eventually educating the world about African wars and the rehabilitation of child soldiers.

Beah has seen some of the worst things that teenagers can do, if pushed far enough, and he grasps the fundamental similarity between his own life and some of the excruciating histories of juveniles serving life sentences in America. His goal now is to prevent such sentences from being imposed, so that young people like him "can tell others, instead of being locked away."

"Children who commit crimes lack the moral and psychological underpinnings of adults," he says, "but they're also more resilient, so it is very possible to change. And it is only through rehabilitating such children and youth that we are able to learn how to prevent a similar situation from happening to others." Beah's own story illustrates that a youth who has committed even the most horrific crimes can, given another chance, build a joyful and meaningful life. Because he was not judged solely on

who he was as a fifteen-year-old, he says, "I discovered my own potential and have become a productive member of society."

* * * * * * * * *

The stories of the *Amici* are only a handful of countless more that exist, many of which properly are confidential under existing juvenile court rules. Not every juvenile offender goes on to become an acclaimed actor, a United States Senator, a poet, or a software executive. Indeed, not every juvenile offender will be rehabilitated. But because no child is a finished product, every child has the potential to be redeemed, and if given the opportunity many will accomplish great things.

A sentence of life in prison without the possibility of parole, like a death sentence, extinguishes all hope that a juvenile offender might one day contribute to his or her community as have Charles Dutton, Senator Alan Simpson, Dwayne Betts, Luis Rodriguez, Terry Ray, T.J. Parsell, Ishmael Beah, and others like them.[4] "When you get a life sentence, you have no reason to think about the future. You only think about the day to day," says Betts. "If I know I can never get out of prison, that's as good as dead to me," says Dutton. "I would prefer the death penalty to a life sentence without the possibility of parole."

This Court found in *Roper* that juveniles are less culpable than adults, that their minds are not fully developed, and that they are more subject to peer pressure and other environmental factors. *Amici*

---

[4] *See Second Chances, supra.*

know from their experiences that, upon attaining adulthood, juvenile offenders often can overcome their troubled pasts.

The Eighth Amendment's Cruel and Unusual Punishment Clause "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). *Amici* submit that evolving standards of decency compel the conclusion that a juvenile offender may not be sentenced to life in prison without parole as punishment for a non-homicide offense. The personality of such an offender is still too unformed, and the potential for productive contributions to society simply too great, to allow such a result. In Senator Simpson's characteristically blunt and common-sense words, "Anybody in our society – unless they are totally out to lunch – can understand that a guy of twenty-five or thirty-five is not the same guy of seventeen. You can't just throw a kid in the clink forever."

CONCLUSION

For the foregoing reasons, the decisions of the District Court of Appeal of Florida, First District, should be reversed.

Respectfully submitted,

DAVID W. DEBRUIN*
Counsel of Record
JONATHAN F. OLIN
ERIC R. HAREN
NICHOLAS O. STEPHANOPOULOS
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000

July 23, 2009

Attorneys for Amici Curiae

developmental research that confirmed, inter alia, the transitory nature of the characteristics of youth, their diminished criminal culpability and their capacity for change and rehabilitation. This research informs the outcome in these appeals as well.

Lastly, this Court's Eighth Amendment jurisprudence proscribes penalties that do not accord with human dignity. Looking beyond legislative indicia, this Court must exercise its own independent judgment in determining the constitutionality of criminal punishments under the Eighth Amendment. Such independent judgment must consider the diminished culpability of the petitioners and the fact that these life without parole sentences fail to serve any legitimate penological purpose.

This Court's historical youth jurisprudence, informed by research and buttressed by the Court's independent consideration of whether a sentence of life without parole imposed on adolescents comports with human dignity, collectively prohibit the imposition of these sentences on youth who have been convicted of non-homicide crimes committed while under the age of eighteen.

ARGUMENT

I. COURTS HAVE A SPECIAL DUTY TO ENSURE THAT THE EIGHTH AMENDMENT ADEQUATELY PROTECTS YOUTH

The fact that minors are different than adults is a principle that permeates our law. As Justice Frankfurter so aptly articulated, "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a state's duty towards children." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). Accordingly, this Court has consistently considered the developmental and social differences of youth in measuring the scope and breadth of minors' constitutional rights in both civil and criminal law.

This Court's constitutional jurisprudence confirms that a sentence of life without parole must be assessed in light of the unique developmental status and diminished culpability of youth as a class. While this Court has, of course, considered the constitutionality of the death penalty as applied to youth, *see, e.g., Roper v. Simmons*, 543 U.S. 551 (2005), *Thompson v. Oklahoma*, 487 U.S. 815 (1988), *Stanford v. Kentucky*, 492 U.S. 361 (1989), to date, this Court has not considered an Eighth Amendment challenge to a juvenile sentence other than the

death penalty.[2] The substantive factors underlying the Court's decision in Roper – including the diminished culpability of youth as a class and their innate capacity for change – apply equally here, and also compel the conclusion that imposition of the irrevocable penalty of life without parole for a person who was under 18 at the time of his or her crime is cruel and unusual.

This Court has previously raised the concern that the federal courts must be provided with objective factors with which to assess the constitutionality of criminal sentences. Thus, the difficulty of assessing the gravity of an offense – or comparing the gravity of offenses in various jurisdictions – may pose a barrier to the Court's willingness to determine whether a particular term of years sentence is constitutional. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 959 (1991) (*Kennedy, concurring in part and concurring in the judgment*) ("proportionality review by federal courts should be informed by objective factors to the maximum extent possible...."); *Ewing v. California*, 538 U.S. 11, 23-24 (2003) (describing the "principles of proportionality review" Kennedy laid out in *Harmelin* as guiding the Court's "application of the Eighth Amendment...."); *Coker v. Georgia*, 433 U.S. 484, 592 (1977) ("Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be

---

[2]Because this case rests upon this Court's jurisprudence on youth, it does not require the Court to reach the question of whether in other contexts "death is different" such that death penalty cases require a different and more rigorous analysis under the Eighth Amendment.

informed by objective factors to the maximum possible extent.") Here, however, this Court's previous application of the Constitution to adolescents, informed by medical, scientific and adolescent development research, provides objective factors to guide the Court's reasoning.

This Court's previous cases require the recognition that youth are different from adults in large part because of their capacity to change and their diminished culpability. Criminal sentences that disregard these central distinctions between adolescents and adults, including the death penalty and life without parole, are unconstitutional. In contrast, a sentence of life with the possibility of parole may be constitutional under appropriate circumstances because it would allow for a later individualized assessment of the culpability and dangerousness of a juvenile offender. Moreover, the depth of an adolescent's capacity to change, and in fact the inevitability of change and maturation for an adolescent, distinguishes youthful defendants from all other types of defendants. Indeed, this Court has already established that for the purpose of reduced culpability, the appropriate age to draw the line is age eighteen. *Roper,* 543 U.S. at 554 ("While drawing the line at 18 is subject to the objections always raised against categorical rules, that is the point where society draws the line for many purposes between childhood and adulthood and the age at which the line for death eligibility ought to rest.").

A. Supreme Court Constitutional Jurisprudence Recognizes the Unique Developmental Status of Minors

1. This Court's Constitutional Jurisprudence Recognizes the Importance of the Transitory Nature of Adolescence for Both Criminal Culpability and Criminal Procedure.

The emerging body of research confirming the distinct emotional and psychological status of youth was critical to *Roper v. Simmons*, 543 U.S. 551 (2005), this Court's landmark ruling abolishing the juvenile death penalty. In prohibiting the execution of offenders under the age of eighteen as a violation of the Eighth Amendment's ban on cruel and unusual punishment, this Court relied on medical, psychological and sociological studies, as well as common experience, which all showed that children under age eighteen are less culpable and more amenable to rehabilitation than adults who commit similar crimes. *Id.* at 568-76. This Court in *Roper* reasoned that because juveniles have reduced culpability, they cannot be subjected to the harshest penalty reserved for the most depraved offenders; punishment for juveniles must be moderated to some degree to reflect their lesser blameworthiness.

Central to this Court's determination about juvenile culpability in *Roper* was its understanding that the personalities of adolescents are "more transitory" and "less fixed" than those of adults. *Id.* at 570. This Court further explained that

> Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Johnson[v. Texas*, 509 U.S. 350...], 368, 113 S.Ct. 2658[(1993)]; see also Steinberg & Scott 1014 ("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood").

Id. This Court noted that this transient nature of a youth's personality was confirmed by psychological and psychiatric practice:

> It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. See Steinberg & Scott 1014-1016. As we understand it, this difficulty underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for

> the feelings, rights, and suffering of others. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 701-706 (4th ed. text rev.2000); see also Steinberg & Scott 1015.

Id. at 573. As a result, this Court's holding rested in part on the incongruity of imposing a final and irrevocable penalty on an adolescent, who had capacity to change and grow. "[I]t would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.* at 570. The Court underscored that the state was not permitted to extinguish the juvenile's "potential to attain a mature understanding of his own humanity." *Id.* at 573.

Roper brought a new scientific lens to this Court's Constitutional jurisprudence, relying on recent – and highly informative – developments in research on adolescent development.[3] While *Roper* enriched the

---

[3] The Court cited the following articles and studies in its opinion: Jeffrey Jensen Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339 (1992); Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003); Erik H. Erikson, *Identity: Youth and Crisis* (1968). Other studies support the same conclusion. *See also* Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 Behav. Sci. & L. 741-760 (2000); Elizabeth S. Scott and Thomas Grisso, *Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88(1) J. Crim. L. & Criminology 137, 137-189 (1997); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth*

constitutional analysis by embedding its reasoning in science, it also built upon this Court's long history of recognizing that there are differences between youth and adults that merit consideration and often different treatment under the Constitution. This body of research, cited approvingly by the *Roper* Court, strongly confirms the longstanding principle that courts must recognize developmental differences between adolescents and adults, and that all youth should be shielded from the harshest consequences of criminal liability.

For example, in *Haley v. Ohio,* this Court recognized that when it comes to criminal procedure, a teenager cannot be judged by the more exacting standards applied to adults. 332 U.S. 596 (1948) (holding unconstitutional the statement of a fifteen-year old defendant). Because minors are generally less mature and more vulnerable to coercive interrogation tactics than adults, they deserve heightened protections under the Constitution. *Id.* The *Haley* Court emphasized the unique vulnerability of youth during the period of adolescence:

---

and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships during Postadolescent Brain Maturation, 21(22) J. Neuroscience 8819, 8819-8829 (2001); Nat'l Inst. Mental Health, *Teenage Brain: A work in progress, A brief overview of research into brain development during adolescence*, NIH Publ'n No. 01-4929 (2001); Kristen Gerencher, *Understand your teen's brain to be a better parent.* Detroit Free Press, Feb. 2, 2005; Barry C. Feld, *Competence, Culpability, and Punishment: Implications of* Atkins *for Executing and Sentencing Adolescents*, 32 Hofstra L. Rev. 463, 515-522 (2003) (discussing scientific studies on adolescent neurological development).

> Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces.

Id. at 599.

This Court has also been explicit that constitutional rights themselves may be – and often must be – defined with reference to an individual's age and developmental status. In *Gallegos v. Colorado*, for example, this Court, considering the admissibility of a juvenile's statement, observed that an adolescent "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions.... Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had." 370 U.S. 49, 54 (1962). *See also Haley*, 332 U.S. at 601 ("Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them.") *See also In re Gault*, 387 U.S. 1, 48 (1967) (observing that confessions may be particularly problematic when taken from "children from an early age through adolescence" and that without procedural protections, a confession may be "the product of ignorance of rights or of adolescent fantasy, fright or despair." *Id.* at 55.)

This Court has similarly recognized the unique attributes of youth at other key points of their involvement in the juvenile and criminal justice systems. For example, this Court has acknowledged

that a child has a particular need for the "'guiding hand of counsel at every step in the proceedings against him.'" *Id.* at 36 (extending key constitutional rights including the right to counsel to minors subject to delinquency proceedings in juvenile court). This Court has also sought to promote the well-being of youth by ensuring their ongoing access to rehabilitative, rather than punitive, juvenile justice systems. *See McKeiver v. Pennsylvania,* 403 U.S. 528, 539-40 (1971); *Gault*, 387 U.S. at 15-16. *See also* Barry C. Feld, *Bad Kids: Race and the Transformation of the Juvenile Court* 92 (1999) (noting that the malleability of youth is central to the rehabilitative model of the juvenile court).

2. This Court's Constitutional Jurisprudence in Civil Cases Also Takes Account of the Unique Developmental Status of Children

This Court's special treatment of youth is not limited to their encounters with the juvenile and criminal justice systems. In civil cases, as well, this Court has frequently expressed its view that children are different from adults, and tailored its constitutional analysis accordingly. Reasoning that "during the formative years of childhood and adolescence, minors often lack . . . experience, perspective, and judgment," *Bellotti v. Baird*, 443 U.S. 662, 635 (1979), the Court in a series of cases has upheld greater state restrictions on minors' exercise of reproductive choice. *Bellotti v. Baird*, 443 U.S. 662, 635 (1979), S*ee also Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990) ("The State has a strong

and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely."). As a result, this Court has held that a state may choose to require that minors consult with their parents before obtaining an abortion, subject to a constitutionally required bypass procedure, and may take other "reasonable step[s] in regulating its health professions to ensure that, in most cases, a young woman will receive guidance and understanding from a parent." *Ohio v. Akron Center For Reproductive Health*, 497 U.S. 502, 520 (1990). *See also Hodgson*, 497 U.S. at 483 (Kennedy, J., concurring in part) ("Age is a rough but fair approximation of maturity and judgment, and a State has an interest in seeing that a child, when confronted with serious decisions such as whether or not to abort a pregnancy, has the assistance of her parents in making the choice."); *id* at 458 (O'Connor, J., concurring in part) (holding that the liberty interest of a minor deciding to bear child can be limited by parental notice requirement, given that immature minors often lack the ability to make fully informed decisions); *Bellotti*, 443 U.S. at 640 (holding that because immature minors often lack capacity to make fully informed choices, the state may reasonably determine that parental consent is desirable).

This Court has also held, as a matter of First Amendment law, that different obscenity standards apply to children than to adults, *Ginsburg v. New York*, 390 U.S. 629, 637 (1968), and that the state has a compelling interest in protecting children from images that are "harmful to minors." *Denver Area Educational Telecommunications Consortium, Inc. v.*

FCC, 518 U.S. 727, 743 (1996). *See also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that public school authorities may censor school-sponsored publications). Similarly, the Court has upheld a state's right to restrict when a minor can work, guided by the premise that "[t]he state's authority over children's activities is broader than over the actions of adults." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

The developmental status of youth has played a role as well to this Court's school prayer cases. Thus, in holding that prayers delivered by clergy at public high school graduation ceremonies violate the Establishment Clause of the First Amendment, this Court observed that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressures in the elementary and secondary public schools. *Lee v. Weissman*, 505 U.S. 577, 593 (1992) . In explaining those coercive pressures, the *Weisman* Court contrasted mature adults and children, noting that the latter are "often susceptible to pressure from their peers towards conformity . . . in matters of social convention." *Id.* Similarly, in *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000), this Court held that prayers authorized by a vote of the student body and delivered by a student prior to the start of public high school football games violated the Establishment Clause. The opinion stressed "the immense social pressure" on students, *id.* at 311, observing that "the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one." *Id.* at 312.

In a wide variety of contexts, this Court's constitutional rulings both recognize and respond to

the key developmental differences between adolescents and adults.

3. Social Science Research Confirms the Transitory Nature of Adolescence and the Capacity of Youth for Rehabilitation.

This Court's emphasis on the transitory nature of youth finds support in social science literature. "Contemporary psychologists universally view adolescence as a period of development distinct from either childhood or adulthood with unique and characteristic features." Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 31 (2008). A central feature of adolescence is its transitory nature. As Scott and Steinberg explain:

> The period is *transitional* because it is marked by rapid and dramatic change within the individual in the realms of biology, cognition, emotion, and interpersonal relationships.... Even the word "adolescence" has origins that connote its transitional nature: it derives from the Latin verb *adolescere*, to grow into adulthood.

Id. at 32.

Studies show that youthful criminal behavior can be distinguished from permanent personality traits. Rates of impulsivity are high during adolescence and early adulthood and decline thereafter. See Steinberg, Cauffman, Banich & Graham, *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report:*

Evidence for a Dual Systems Model, 44 Dev. Psych. 1764 (2008). As youth grow, so do their self-management skills, long-term planning, judgment and decision-making, regulation of emotion, and evaluation of risk and reward. *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psych. 1009, 1011 (2003). As a result, "[t]he typical delinquent youth does not grow up to be an adult criminal...." *Id.* at 54. As one report explained,

> More than 30 percent of boys examined in one study committed one or more acts of serious violence by age 18. Few of these youth were ever arrested for violent offenses, but more than three-fourths nonetheless terminated their violence by age 21. Other research has found that the criminal careers of most violent juvenile offenders span only a single year. Understanding this self-correcting dynamic is crucial in any attempt to combat juvenile crime. Most juvenile offenders – even those who commit serious acts of violence – are not destined for lives of crime.

Richard A. Mendel, Less Hype, More Help: Reducing Juvenile Crime, What Works – and What Doesn't 15 (2000). Thus, not only are youth developmentally capable of change, research also demonstrates that when given a chance, even youth with histories of violent crime can and do become productive and law abiding citizens, even without any interventions.

These findings (unsurprising to any parent)

are primarily grounded in behavioral research, but also consistent with recent findings in developmental neuroscience. Brain imaging techniques show that areas of the brain associated with impulse control, judgment, and the rational integration of cognitive, social, and emotional information do not fully mature until early adulthood. Scott & Steinberg, *Rethinking Juvenile Justice* 46-68.[4]

While the process of physiological and psychological growth alone will lead to rehabilitation for most adolescents, research over the last fifteen years on interventions for juvenile offenders has yielded rich data on the effectiveness of programs

---

[4] *See also* Elizabeth Sowell, et al., *In vivo evidence for post-adolescent brain maturation in frontal and striatal regions*, 2 Nat. Neurosci. 859-861 (1999); Nitin Gogtay, et al. *Dynamic Mapping of Human Cortical Development during Childhood through Early Adulthood*, 101 Nat'l Acad. Sci. Proc. 8174-8179 (2004), http://www.loni.ucla.edu/~thompson/DEVEL/PNASDevel04.pdf. While it is beyond the scope of this brief to explore the adolescent psychology research comprehensively, it i worth noting that one of the clearest visual representations of these differences can be found at http://www.nytimes.com/interactive/2008/09/15/health/20080915-brain-development.html?scp=1&sq=interactive%20compare%20brain%20development%20in%20various%20areas%20&st=cse, an interactive web-based link allowing visitors to compare brain development in various areas (such as judgment) at different ages. The research demonstrates that while the seventeen year old brain is fairly developed, it is not until age twenty-one that a youth experiences "tremendous gains in emotional maturity, impulse control and decision-making [that will] continue to occur into early adulthood." *Id.* Thus, while there are distinctions between the development levels of older adolescents' brains and those of younger teens, this biological process is not typically complete until a child reaches his or her mid-twenties.

that reduce recidivism and save money, underscoring that rehabilitation is a realistic goal for the overwhelming majority of juvenile offenders, including violent and repeat offenders. The Surgeon General has recognized the capacity of violent youth to respond to rehabilitation:

> [E]ffective treatment can divert a significant proportion of delinquent and violent youths from future violence and crime. This finding contradicts the conclusions of scientists two decades ago who declared that nothing had been shown to prevent youth violence. The second major conclusion is that there is enormous variability in the effectiveness of different types of programs for seriously delinquent youth. The most effective programs, on average, reduce the rate of subsequent offending by nearly half (46 percent), compared to controls....

Dep't of Health and Human Services, Youth Violence: A Report of the Surgeon General, ch. 5 (2001), http://www.surgeongeneral.gov/library/youthviolence/chapter5/sec5.html.

Examples of programs shown to be effective with violent and aggressive youth include Functional Family Therapy (FFT), Multidimensional Therapeutic Foster Care (MTFC), and Multi-Systemic Therapy (MST). *See* Peter W. Greenwood, *Changing Lives: Delinquency Prevention as Crime-Control Policy* 70 (2006). All three have been shown to significantly reduce recidivism rates even for serious violent offenders. *See* Charles M. Borduin et

al., *Multisystemic Treatment of Serious Juvenile Offenders: Long-Term Prevention of Criminality and Violence* 63 J. Consulting & Clinical Psychol. 569, 573 (1995) (describing the effectiveness of MST in reducing recidivism rates even for serious offenders with histories of repeat felonies); Carol M. Schaeffer and Charles M. Borduin, *Long-term follow-up to a randomized clinical trial of multisystemic therapy with serious and violent juvenile offenders*, 73 J. Consulting & Clinical Psychol. 445, 449-452 (2005) (finding that the benefits of MST often extend into adulthood); Hinton et al., Juvenile Justice: A System Divided, 18 *Crim. Just. Pol'y Rev.* 466, 475 (2007) (describing FFT's success with drug-abusing youth, violent youth, and serious juvenile offenders.); J. Mark Eddy et al., *The Prevention of Violent Behavior by Chronic and Serious Male Juvenile Offenders: A 2-Year Follow-up of a Randomized Clinical Trial,* 12 J. Emotional & Behav. Disorders 2, 2-7 (2004) (describing reduced recidivism rates for violent and chronically offending youth who participated in MTFC).

Indeed, there is compelling evidence that many juvenile offenders, even those charged with serious and violent offenses, can and do achieve rehabilitation and change their lives to become productive citizens. *See* Second Chances: 100 Years of the Children's Court: Giving Kids a Chance To Make a Better Choice (Justice Policy Inst. & Children & Family Law Ctr., n.d.), http://www.cjcj.org/files/ secondchances.pdf (last visited Jun. 12, 2009) (profiling 25 individuals, including D.C. District Court Judge Reggie Walton and former United States Senator Alan Simpson, who were adjudicated delinquent in juvenile court –

many for violent offenses including attempted murder and armed robbery – and then changed the course of their lives.

B. The Supreme Court's Duty Under the Eighth Amendment to Ensure that Penalties Accord with Human Dignity Precludes the Imposition of Life Without Parole on Adolescents.

This Court has been clear that the decisive question in determining whether a penalty is constitutional under the Eighth Amendment is whether it comports with human dignity. As this Court has explained, "our cases... make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'" *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) *citing Trop v. Dulles*, 356 U.S. 86, 100 (1958). The *Gregg* Court further explained:

> Although legislative measures adopted by the people's chosen representatives provide one important means of ascertaining contemporary values, it is evident that legislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power.

Id. at 174 n.19. As this Court has repeatedly observed, the Court itself must determine in its "own

independent judgment" whether a penalty is constitutional. *Roper v. Simmons*, 543 U.S. 551, 564 (2005). This analysis is even more vital in the case of youth; as described above, this Court has consistently recognized that youths' unique developmental status informs the constitutional analysis. Thus, for a penalty to be constitutional, it must be appropriately calibrated to the defendant's "personal responsibility and moral guilt." *Harmelin v. Michigan*, 501 U.S. 957, 1023 (1991). For an adolescent, that determination includes consideration of the diminished responsibility and guilt of adolescents as a class. As petitioners have explained, there is a national consensus against imposing life without parole in both cases before the Court today. However, because a penalty that fails to consider the diminished culpability of adolescents as a class is unconstitutional, this Court's analysis need not depend on such a determination.

1. When Considering Juvenile Life Without Parole, this Court Must Take Into Account the Diminished Culpability of Juveniles.

This Court has been clear that for those who *as a class* have diminished culpability, the relevant question under the Eighth Amendment is whether the severity of the sentence can ever be appropriate for a member of the class. Thus, an offender's youth or mental capacity can make certain penalties unconstitutional regardless of the severity of the offense. In *Roper*, this Court concluded that a death

sentence is categorically unconstitutional as applied to any youth under eighteen. The Court explained:

> Given this Court's own insistence on individualized consideration, petitioner maintains that it is both arbitrary and unnecessary to adopt a categorical rule barring imposition of the death penalty on any offender under 18 years of age.
>
> We disagree. The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.

Roper v. Simmons, 543 U.S. 551, 572-73 (2005). Thus, regardless of the brutality of the crime, the death penalty may not be imposed. *Id.* This categorical exclusion protects the vast majority of juveniles whose crimes, even if extremely serious, reflect "unfortunate yet transient immaturity," from receiving an irreversible punishment designed for those whose characters are irreparable. *Id.* at 573. *See also Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (highlighting that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.")[5]

---

[5] While the cases resting on a finding of lesser culpability arise in the context of the death penalty, this Court has indicated that categorical culpability is meaningful in other contexts as well. *See, e.g., Robinson v. California*, 370 U.S. 660, 667(1962) (invalidating a statute criminalizing being addicted to the use of narcotics and determining that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual

As a number of state courts have recognized, this same logic dictates holding a sentence of life without the possibility of parole unconstitutional for juveniles. As the Kentucky Supreme Court explained, "[t]he intent of the legislature in providing a penalty of life imprisonment without benefit of parole . . . was to deal with dangerous and incorrigible individuals who would be a constant threat to society. We believe that incorrigibility is inconsistent with youth. . . ." *Workman v. Commonwealth*, 429 S.W.2d 374, 377 (Ky. 1968). The Nevada Supreme Court has similarly recognized the incongruity of applying a sentence of life without parole to juveniles, observing:

> Before proceeding we pause first to contemplate the meaning of a sentence "without possibility of parole," especially as it bears upon a seventh grader. All but the deadliest and most unsalvageable of prisoners have the right to appear before the board of parole to try and show that they have behaved well in prison confines and that their moral and spiritual betterment merits consideration of some adjustment of their sentences.

Naovarath v. State, 779 P.2d 944, 944 (Nev. 1989). The court concluded that this was a "severe penalty indeed" to impose upon an adolescent and held that it could not be constitutionally applied to a thirteen-year-old. *Id.* at 944-45.

---

punishment for the 'crime' of having a common cold."). While the issue before the Court in *Robinson* was the type of offense, the recognition that addiction alone does not warrant imprisonment also underscores the importance of individual culpability in Eighth Amendment analysis.

Similarly, the California appellate courts have held that an adolescent's capacity to change affects the constitutionality of his or her sentence. The California Appellate Court for the Fourth District, building upon the state's longstanding recognition of the legal differences between youth and adults, recently explained:

> Age also matters..... [T]he perpetrator's age is an important factor in assessing whether a severe punishment falls within constitutional bounds. ([*People v.*] *Dillon*,... 34 Cal.3d [441,] ...479, 194 Cal. Rptr. 390, 668 P.2d 697.) Youth is generally relevant to culpability (ibid.; cf. Cal. Rules of Court, rule 4.413(c)(2)(C)), and the diminished "degree of danger" ([*In re*] *Lynch*, ... 8 Cal.3d [410,]...425, 105 Cal. Rptr. 217, 503 P.2d 921) a youth may present after years of incarceration has constitutional implications (see *In re Barker* ...151 Cal.App.4th 346, 375, 59 Cal.Rptr.3d 746 [(Cal.App.1 Dist., 2007)].
>
> In *Barker*, the court "agreed with the observations of the federal district court in *Rosenkrantz v. Marshall* [...] 444 F.Supp.2d 1063[, 1085] [(C.D.Cal.2006)] that "the general unreliability of predicting violence is exacerbated in [a] case by ... petitioner's young age at the time of the offense [and] the passage [in that case] of nearly twenty years since that offense was committed..."

In re Nunez 173 Cal.App. 4th 709, 726-27 (2009). The Court therefore held that petitioner's youth, in conjunction with other factors, made

unconstitutional the imposition of juvenile life without parole. *Id.* *See also id.* at 736 ("Stated differently by our Supreme Court, the harshness of an LWOP is particularly evident 'if the person on whom it is inflicted is a minor, who is condemned to live virtually his entire life in ignominious confinement, stripped of any opportunity or motive to redeem himself for an act attributable to the rash and immature judgment of youth.'")

Moreover, recognizing the unique developmental status of youth provides this Court with objective and reasoned guidance with which to analyze the cases before it. For juveniles subject to life without the possibility of parole, this Court can follow its previous decisions in acknowledging that: (1) youth are different from adults; and (2) therefore, a penalty which disregards a youth's developmental status by wholly failing to provide for a youth's capacity to change is unconstitutional. Under this second prong, a sentence of life with the possibility of parole may be constitutional under the appropriate circumstances because the parole system in place would allow for a subsequent review of the culpability and dangerousness of a juvenile offender, later grown into a mature adult, and his current state of rehabilitation.

Roper recognized that society's selection of age eighteen as the line between youth and adulthood was also the appropriate line below which youth could not be subject to the death penalty. This accepted view of adulthood also must inform the analysis of life without parole, a punishment that is similarly irrevocable, and also ends in death. 543 U.S. at 572-73. Social science research further supports the decision to draw the line at age

eighteen. While younger adolescents lack the cognitive capacity of older adolescents, sixteen and seventeen year olds actually have *more* problems with risk perception than younger adolescents. Barry Feld, *A Slower Form of Death: Implications of* Roper v. Simmons *for Juveniles Sentenced to Life Without Parole*, 22 Notre Dame J.L. Ethics & Pub. Pol'y 9, 35-36 (2008). A study of over 900 individuals aged ten to thirty found that while impulsivity and sensation-seeking decline with age, both preference for risk and inability to perceive it peak at late adolescence. *See* MacArthur Found. Research Network on Adolescent Dev. & Juvenile Justice, Development and Criminal Blameworthiness (2006), http://www.adjj.org/ downloads/3030PPT-%20Adolescent%20Development %20and%20Criminal%20Blameworthiness.pdf. The study concluded that eighteen is the pivotal age at which adolescents' proclivity for risk declines precipitously. *Id.*

2. Because Life Without the Possibility of Parole Does not Serve a Legitimate Penological Purpose, it is Unconstitutional as Applied to Adolescents.

This Court has been careful not to dictate to the states the proper purposes of punishment. *See, e.g., Ewing v. California*, 538 U.S. 11, 25 (2003) ("Our traditional deference to legislative policy choices finds a corollary in the principle that the Constitution 'does not mandate adoption of any one penological theory.' [*Harmelin*] at 999, 111 S.Ct. 2680 (Kennedy, J., concurring in part and concurring

in judgment)). Thus, "A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. . . . Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts." *Id.*

A state may choose to impose a punishment for purposes of retribution, incapacitation, deterrence, rehabilitation – or any combination thereof. *Id.* A punishment that serves no legitimate penological purpose, however, inflicts needless pain and suffering in violation of the Eighth Amendment. As this Court reasoned in *Coker v. Georgia,* 433 U.S. 584, 592 (1977), "a punishment is 'excessive' and unconstitutional if it...makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." *See also Atkins v. Virginia*, 536 U.S. 304, 319 (2002); *Enmund v. Florida*, 458 U.S. 782, 798 (1982). Whether life without parole serves a legitimate purpose – and comports with the dignity of man – therefore rests at least in part on whether it serves a legitimate penological purpose. Juvenile life without parole sentences do not appropriately serve any of the purposes of punishment.

a. *Deterrence*

First, these sentences do not effectively deter other juveniles from committing similar crimes. In *Roper*, the Court noted that "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Roper v. Simmons,* 543 U.S. 551, 571

(2005) (discussing psychological studies that demonstrate "the absence of evidence of deterrent effect" of the death penalty on would-be juvenile offenders); *See also Thompson* 487 U.S. at 837-38 (remarking that for children under age sixteen, "it is obvious that the potential deterrent value of the death sentence is insignificant for two reasons. The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent. And, even if one posits such a cold-blooded calculation by a 15-year-old, it is fanciful to believe that he would be deterred by the knowledge that a small number of persons his age have been executed during the 20th century"). Logic suggests that if the death penalty does not effectively deter young people, neither will a sentence of life without parole. *See, e.g., Naovarath v. State*, 779 P.2d 944, 948 (Nev. 1989) (holding that life without parole for a thirteen year old defendant was unconstitutional and questioning whether the sentence could even serve as a deterrent for other teenagers). Indeed, criminological studies questioning the deterrent effect of harsh adult criminal sanctions on juveniles further underscore this point: if the threat of some adult sentences fails to deter youth, the possible imposition of the relatively rare and extreme adult sentence of life without parole is unlikely to do so either. *See* Jeffrey Fagan, *Juvenile Crime and Criminal Justice: Resolving Border Disputes*, 18 Future of Child. 81, 102-103 (2008), http://www.eric.ed.gov/ ERICDocs/ data/ericdocs2sql/content_storage_01/0000019b/80/41/ 92/20.pdf; David Lee and Justin McCrary, "*Crime, Punishment, and Myopia*," (Nat'l Bureau of Econ. Research, Working Paper No. W11491, 2005). *See*

also Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 *Crime & Delinq.* 96, 96-104 (1994), cited in Donna Bishop, *Juvenile Offenders in the Adult Criminal System*, 27 *Crime & Just.* 81 (2000); Richard Redding & Elizabeth Fuller, *What Do Juveniles Know About Being Tried as Adults? Implications for Deterrence*, Juvenile & Family Court Journal (Summer 2004) (cited in Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 199 (2008)).

b. Retribution

Life without parole sentences also fail to serve a legitimate retributive purpose. While retribution is served to some degree by any harsh sentence, that does not end the inquiry. Indeed, "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison v. Arizona*, 481 U.S. 137, 149 (1987). As the *Roper* Court stated about the culpability of youth: "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571. Thus, the *Roper* Court found that because offenders younger than eighteen are less culpable and more amenable to rehabilitation than those who are older, it is impossible to determine with any reasonable certainty that they are beyond redemption. *Id.*, at 568-75 (noting that differences between juveniles and adults "render suspect any conclusion that a

juvenile falls among the worst offenders. . . The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.* at 570). The *Roper* Court underscored that children should be treated differently because of their relative "lack of maturity," their susceptibility to outside pressures, and the still-developing nature of their personalities. *Roper*, 543 U.S. at 569 - 70.[6]

This conclusion, too, finds ample support in behavioral and neurobiological research. Adolescence has been characterized as a period of "tremendous malleability" and "tremendous plasticity in response to features of the environment." *See* Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court, in Youth on Trial: A Developmental Perspective on Juvenile Justice* 9, 23 (Thomas Grisso and Robert Schwartz eds., 2000). Recent scholarship confirms that "[a]s a developmental stage, adolescence is a

---

[6] On this issue, *Roper* follows a long line of cases recognizing juveniles' distinctive susceptibility to coercion and pressure. *See, e.g., In re Gault*, 387 U.S. 1, 39 (1967) (juveniles need the assistance of counsel to prevent coercion in the courtroom); *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (holding the death penalty unconstitutional for juveniles under age 16 at the time of their crime because "inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult"); *Lee v. Weissman*, 505 U.S. 577, 592 (1992) (holding school prayer unconstitutional and noting that "[a]s we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.")

complex mixture of the transitional and the formative," Scott & Steinberg, *Rethinking Juvenile Justice* 32, and that

> Because adolescents' executive functions are not mature, their capacities for planning, for anticipating future consequences, and for impulse control are deficient—as compared with those of adults—at a time when their inclination to engage in risk-taking behavior in the company of peers is greater than it will be in a few years."

Id. at 49.

Additionally, some studies have suggested that "adolescents' risk perception actually declines during mid-adolescence and then gradually increases into adulthood -- sixteen- and seventeen-year-old youths perceive fewer risks than do either younger or older research subjects." Barry Feld, *A Slower Form of Death: Implications of* Roper v. Simmons *for Juveniles Sentenced to Life Without Parole*, 22 Notre Dame J.L. Ethics & Pub. Pol'y 9, 35-36 (2008).

The reasoning of *Roper* applies with equal force here – life without parole, termed by some as a "slow death," is an extraordinarily severe punishment. Elizabeth Cepparulo, Roper v. Simmons: Unveiling Juvenile Purgatory: Is Life Really Better than Death? 16 Temp. Pol. & Civ. Rts. L. Rev. 225, 239 (2006). Moreover, LWOP's finality allows no room to recognize a child's development and growth. When inflicted on youth with diminished culpability and heightened capacity to change, the sentence is too disproportionate to serve

its retributive aims within the bounds of the Eighth Amendment.

c. Incapacitation

As for incapacitation, although LWOP sentences do serve that purpose, such incapacitation is unreasonable and disproportionate where the offender no longer poses a danger to the community. *See United States v. Jackson*, 835 F.2d 1195, 1200 (7th Cir. 1987) (Posner, J., concurring) ("A civilized society locks up [criminals] until age makes them harmless but it does not keep them in prison until they die"). This Court, in *Roper*, recognized that this may be particularly relevant to youth: "Indeed, 'the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.'" 543 U.S. at 570 (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)). The Court further emphasized that "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Id.* at 569-70 (internal citations omitted). Because "it is difficult even for expert psychologists to differentiate between" a crime reflecting immaturity and one reflecting "irreparable corruption," a sentence that makes no allowance for a child's future rehabilitation should not stand. *See id.* at 573-74. In *Graham v. Collins*, this Court similarly emphasized the role of future dangerousness in assessing the constitutionality of a sentence, noting that: "youthfulness may also be

seen as mitigating just because it is transitory, indicating that the defendant is less likely to be dangerous in the future." 506 U.S. 461, 518 (1993).

Sociological and psychological research supports this conclusion. *See* Steinberg & Schwartz, "*Developmental Psychology Goes to Court*," 23 (explaining that the malleability of adolescence suggests that a youthful offender is capable of altering his life course and developing a moral character as an adult); John H. Laub & Robert J. Sampson, *Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70* (2003) (documenting the criminal histories of 500 individuals who had been adjudicated delinquents and showing that their youthful characteristics were not immutable; change to a law-abiding life was possible and in many instances depended upon aspects of their adult lives). As a result, a child sent to prison should have the opportunity to rehabilitate and qualify for release after a reasonable term of years. Mechanisms such as parole boards can provide a crucial check to ensure that the purposes of punishment are satisfied without unnecessarily incapacitating fully rehabilitated individuals and keeping youth "in prison until they die." *Naovarath*, 779 P.2d at 948.

d. Rehabilitation

Last, life without parole sentences do not promote rehabilitation for juveniles; they frustrate it. Like the death penalty, life without parole unconstitutionally fails to recognize a child's "potential to attain a mature understanding of his own humanity." *Roper*, 543 U.S. at 554. A mandatory sentence of life imprisonment without the

possibility of parole shares one important characteristic of a death sentence – the offender will never regain his freedom. Because such a sentence does not even purport to serve a rehabilitative function, the sentence must rest on a rational determination that the punished "criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator." *Furman*, 408 U.S. at 307 (Stewart, J., concurring). See also *Naovarath*, 779 P.2d at 944, 948-949 (describing the devastating effects of a life without parole sentence on a youth and holding the sentence unconstitutional as applied to a thirteen-year-old).

Again, research bears out the many ways in which lengthy adult sentences – especially life sentences – work against a youth's rehabilitation. Understandably, many juveniles sent to prison fall into despair. They lack incentive to try to improve their character or skills for eventual release because there will be no release. Indeed, many juveniles sentenced to spend the rest of their lives in prison commit suicide, or attempt to commit suicide. *See* Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* 63-64 (2005), http://www.hrw.org/en/reports/2005/10/11/rest-their-lives; *See also*, Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 Wake Forest L. Rev. 681, 712, nn.141-47 (1998) (discussing the "psychological toll" associated with LWOP, including citations to cases and sources suggesting that LWOP may be a fate worse than the death penalty).

Life without parole sentences are antithetical to the goal of rehabilitation. The "denial of hope,"

Naovarath, 779 P.2d at 944, is antithetical to the core values of human dignity that the Eighth Amendment was enacted to protect.

CONCLUSION

For the foregoing reasons, *Amici Curiae*, Juvenile Law Center, et al., respectfully request that this Court hold juvenile life without parole sentences unconstitutional in all cases, and reverse the Florida Court of Appeals' decisions in the present cases.

Respectfully Submitted,

Marsha L. Levick, Esq.*
*Counsel of Record
Jessica R. Feierman, Esq.
Juvenile Law Center
1315 Walnut Street, Suite 400
Philadelphia, PA 19107

Robin Walker Sterling
Katayoon Majd
Ji Seon Song
National Juvenile Defender Center
1350 Connecticut Avenue NW
Suite 304
Washington, DC 20036

Shobha L. Mahadev
Patricia Soung
Children & Family Justice Center
Bluhm Legal Clinic
Northwestern University School of Law
375 East Chicago Avenue
Chicago, IL 60611

Counsel for Amici Curiae

Dated: July 23, 2009

Sullivan v. Florida & *Graham v. Florida*

Identity of Amici and Statements of Interest

APPENDIX A

Organizations

Juvenile Law Center (JLC) is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. JLC also works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

The **Northwestern University School of Law's Bluhm Legal Clinic** has represented poor children in juvenile and criminal proceedings since the Clinic's founding in 1969. The **Children and Family Justice Center (CFJC)** was established in

1992 at the Clinic as a legal service provider for children, youth and families and a research and policy center. Six clinical staff attorneys currently work at the CFJC, providing legal representation and advocacy for children in a wide variety of matters, including in the areas of juvenile delinquency, criminal justice, special education, school suspension and expulsion, immigration and political asylum, and appeals. CFJC staff attorneys are also law school faculty members who supervise second- and third-year law students in the legal and advocacy work; they are assisted in this work by the CFJC's social worker and social work students.

The **National Juvenile Defender Center (NJDC)** was created to ensure excellence in juvenile defense and promote justice for all children. NJDC responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. NJDC gives juvenile defense attorneys a better capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. NJDC provides support to public defenders, appointed counsel, child advocates, law school clinical programs and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural and tribal areas. It also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

Alabama Fair Sentencing of Children is a grass roots effort in Alabama working to abolish juvenile life without parole. On May 6, 2009, a bill that would affect our children serving Life and Life Without Parole was introduced in the House of Representatives by Bobby Scot (D-VA) and John Conyers (D- MI). The name of the bill is HR 2289, the Juvenile Justice Accountability and Improvement Act of 2009. We are working with the coordinating efforts of the National for the Fair Sentencing of Children in Washington, DC to end life without parole, the death sentence in prison, by advocating the passage of this crucial legislation.

The Barton Child Law & Policy Clinic is a program of Emory Law School dedicated to ensuring safety, well-being and permanency for abused and court-involved children in Georgia. These outcomes are best achieved when systems only intervene in families when absolutely necessary, treat children and families fairly, provide the services and protections they are charged to provide, and are accountable to the public and the children they serve. The mission of the clinic is to promote and protect the well-being of neglected, abused and court-involved children in the state of Georgia, to inspire excellence among the adults responsible for protecting and nurturing these children, and to prepare child advocacy professionals.

The Barton Clinic was founded in March 2000. From summer 2001 – fall 2005, the Barton Clinic also housed the Southern Juvenile Defender Center, a regional support center for attorneys representing children accused of delinquent and status offenses. The Southern Juvenile Defender Center represented

children in juvenile courts in Georgia and provided technical assistance, training, and policy development assistance for seven southern states. In fall 2005 the Southern Juvenile Defender Center moved to the Southern Poverty Law Center. In summer 2006 the Barton Clinic added the Juvenile Defender Clinic to its existing public policy and legislative clinical offerings. Students in the Juvenile Defender Clinic provide quality representation to children by ensuring fairness and due process in their court proceedings and by ensuring courts make decisions informed by the child's educational, mental health and family systems objectives.

Legal services provided by the Barton Clinic are provided at no cost to our clients.

The **Campaign for Youth Justice (CFYJ)** is a national organization created to provide a voice for youth prosecuted in the adult criminal system. The organization is dedicated to ending the practice of trying, sentencing, and incarcerating youthful offenders under the age of 18 in the adult criminal justice system; and is working to improve conditions within the juvenile justice system. CFYJ raises awareness of the negative impact of prosecuting youth in the adult criminal justice system and of incarcerating youth in adult jails and prisons and promotes researched-based, developmentally-appropriate rehabilitative programs and services for youth as an alternative. CFYJ also provides research, training and technical assistance to juvenile and criminal justice system stakeholders, policymakers, researchers, nonprofit organizations, and family members interested in addressing the

unique needs of youth prosecuted in the adult system.

The **Center for Children and Families (CCF)** at Fredric G. Levin College of Law is based at University of Florida, the state's flagship university. CCF's mission is to promote the highest quality teaching, research and advocacy for children and their families. CCF's directors and associate directors are experts in children's law, constitutional law, criminal law, family law, and juvenile justice, as well as related areas such as psychology and psychiatry. CCF supports interdisciplinary research in areas of importance to children, youth and families, and promotes child-centered, evidence-based policies and practices in dependency and juvenile justice systems. Its faculty has many decades of experience in advocacy for children and youth in a variety of settings, including the Child Welfare Clinic and Gator TeamChild juvenile law clinic.

The **Center for Children's Advocacy (CCA)** is a non-profit organization based at the University of Connecticut Law School and is dedicated to the promotion and protection of the legal rights of poor children. The children represented by CCA are dependent on a variety of Connecticut state systems, including judicial, health, child welfare, mental health, education and juvenile justice. CCA engages in systemic advocacy focusing on important legal issues that affect a large number of children, helping to improve conditions for abused and neglected children in the state's welfare system as well as in the juvenile justice system. CCA works to ensure

that children's voices are heard and that children are afforded legal protections everywhere – community, foster placements, educational institutions, justice system and child welfare.

The Center for Children's Law and Policy (CCLP) is a public interest law and policy organization focused on reform of juvenile justice and other systems that affect troubled and at-risk children, and protection of the rights of children in such systems. The Center's work covers a range of activities including research, writing, public education, media advocacy, training, technical assistance, administrative and legislative advocacy, and litigation. CCLP works locally in DC, Maryland and Virginia and also across the country to reduce racial and ethnic disparities in juvenile justice systems, reduce the use of locked detention for youth and advocate safe and humane conditions of confinement for children. CCLP helps counties and states develop collaboratives that engage in data-driven strategies to identify and reduce racial and ethnic disparities in their juvenile justice systems and reduce reliance on unnecessary incarceration. CCLP staff also work with jurisdictions to identify and remediate conditions in locked facilities that are dangerous or fail to rehabilitate youth.

The **Central Juvenile Defender Center**, a training, technical assistance and resource development project, is housed at the Children's Law Center, Inc. In this context, it provides assistance on indigent juvenile defense issues in Ohio, Kentucky, Tennessee, Indiana, Arkansas, Missouri, and Kansas.

The **Children's Law Center, Inc.** in Covington, Kentucky has been a legal service center for children's rights since 1989, protecting the rights of youth through direct representation, research and policy development and training and education. The Center provides services in Kentucky and Ohio, and has been a leading force on issues such as access to and quality of representation for children, conditions of confinement, special education and zero tolerance issues within schools, and child protection issues. It has produced several major publications on children's rights, and utilizes these to train attorneys, judges and other professionals working with children.

Children's Law Center of Los Angeles (CLC) is a nonprofit, public interest law corporation created 18 years ago and funded by the Court to serve as appointed counsel for Los Angeles County's abused and neglected youth. Our 220 person staff of lawyers, paralegals and investigator/social workers serves as the "voice" in the foster care system for the vast majority of the nearly 24,000 children under the jurisdiction of the Los Angeles dependency court. Our committed attorneys and social work investigators are tireless advocates for these vulnerable youth, guiding them through the complicated and often overwhelming foster care system and accompanying court process. Appearing at every hearing, often with their young clients beside them in the courtroom, the child's attorney is the only person in the court speaking exclusively on

behalf of the child and going to bat for these children in ensuring that their needs are met.

Founded in 1977, the **Children's Law Center of Massachusetts (CLCM)** is a private, non-profit legal services agency that provides direct representation and appellate advocacy for indigent children in juvenile justice, child welfare and education matters. CLCM attorneys regularly participate as faculty in MCLE and other continuing legal education seminars and serve as *amicus curiae* in juvenile justice and child welfare matters in Massachusetts courts. The CLCM is particularly concerned with fair treatment and outcomes for juveniles in delinquency proceedings and in adult court. This case presents questions of significance to the rights of all juveniles, but especially to the rights of juveniles as young as 14 in Massachusetts who face mandatory life without parole sentences in adult court.

The **Child Welfare League of America (CWLA)** is an 89-year-old association of more than 600 public and private child and family-service agencies that collectively serve more than 3 million abused, neglected and vulnerable children and youth every year. Since its inception in 1920, CWLA has been a leader in the development of quality programming, practices and policies in all areas of child welfare and child well-being. In our work with children and youth impacted by the juvenile and criminal justice systems, we have grown increasingly concerned about the link between child maltreatment and juvenile delinquency. CWLA advocates for policies and practices that seek to

interrupt the path to criminal offending that is frequently the outcome for victims of child abuse and neglect. CWLA knows that children and adolescents have less capacity than adults to take care of themselves and make good decisions, we also advocate for policies and practices that recognize these fundamental differences and provide children and adolescents with the supports they need to negotiate the path to adulthood. In all of its work, CWLA strives to ensure that every child and young person is protected from harm, injustice and discrimination and at all stages of the court process, juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in achieving these goals.

The ***Civitas* ChildLaw Center** is a program of the Loyola University Chicago School of Law, whose mission is to prepare law students and lawyers to be ethical and effective advocates for children and promote justice for children through interdisciplinary teaching, scholarship and service. Through its Child and Family Law Clinic, the ChildLaw Center also routinely provides representation to child clients in juvenile delinquency, domestic relations, child protection, and other types of cases involving children. The ChildLaw Center maintains a particular interest in the rules and procedures regulating the legal and governmental institutions responsible for addressing the needs and interests of court-involved youth.

The **Defender Association of Philadelphia** is an independent, non-profit corporation created in 1934 by a group of Philadelphia lawyers dedicated to

the ideal of high quality legal services for indigent criminal defendants. Today some two hundred and fifteen full time assistant defenders represent clients in adult and juvenile state and federal trial and appellate courts and at civil and criminal mental health hearings as well as state and county violation of probation/parole hearings. Association attorneys also serve as the Child Advocate in neglect and dependency court. More particularly, Association attorneys represent juveniles charged with homicide. Life imprisonment without the possibility of parole is the only sentence for juveniles found guilty in adult court of either an intentional killing or a felony murder. The Defender Association attorneys have had numerous juveniles given sentences of life imprisonment without parole. The constitutionality of such sentences have been challenged at the trial level and at the appellate level by Defender Association lawyers.

Fight for Lifers, West is a Lifers Support Group in Western Pennsylvania devoted to Prisoners in Pennsylvania who are sentenced to Life Imprisonment Without Parole. In the years since Roper, FFLW has identified 453 Juvenile Lifers in the PADOC, revealing that Pennsylvania leads the world in this category. We have sent 21 newsletters, one every two months, to these 453 Juveniles lifers, helping to make these prisoners aware of each other and giving important information to them. In this way, they have shared information with each other, and made an impact on the outside world. FFLW has been seriously involved in the PA Senate Judiciary Committee Public Hearing on Juvenile Lifers, September 22, 2008, and in the United States House

Subcommittee on Crime and Terrorism and Homeland Security hearing on H.R. 2289- Juvenile Justice Accountability and Improvement Act of 2009, on June 9, 2009. We intend to be involved with the Supreme Court in its consideration of the two Florida cases, and welcome the opportunity to sign on with the Juvenile Law Center in its Amicus brief on behalf of two Florida children who have been sentenced to Life Without Parole.

Human Rights Watch is a non-governmental organization established in 1978 to monitor and promote observance of internationally recognized human rights. It has Special Consultative Status at the United Nations, regularly reports on human rights conditions in the United States and more than seventy other countries around the world, and actively promotes legislation and policies worldwide that advance protections of domestic and international human rights and humanitarian law. Human Rights Watch has investigated life without parole sentences for youth in the United States since 2004. Its reports on this subject include *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (a 2005 report on juveniles sentenced to life without parole throughout the United States); *Thrown Away* (a 2005 report on life without parole for juveniles in Colorado); and *When I Die They'll Send Me Home* (a 2008 report on life without parole for juveniles in California).

International CURE (Citizens United for rehabilitation of Errants) is a grassroots organization that started in San Antonio, Texas, in 1972. In 1974, it expanded to a statewide

organization and in 1985, it became a national group and moved its headquarters to Washington, DC. Since then, there have been nine national conventions and chapters exist in most states. As in Texas, most of these chapters are directed by people who have loved ones in prison and/or who have been incarcerated themselves. In 2005, CURE received consultative status from the United Nations and changed its name from "national" to "international". In June, 2009, International CURE had its 4th International Conference on Prison Reform and Human Rights in Geneva, Switzerland. The goals of CURE are twofold. (1) To use prisons only for those who absolutely have to be in them and (2) For those who have to be incarcerated, they should receive all the rehabilitative opportunities they need to "turn their lives around." CURE strongly feels that these goals will substantially reduce crime.

The **Iowa Coalition to Oppose Life without the Possibility of Parole for Children** is made up of groups of individuals and organizations who support the elimination of the sentence of life without the possibility of parole for children in the state of Iowa. The Coalition works to support legislation that will eliminate the sentence of life without the possibility of parole for children in the state of Iowa.

The **John Howard Association of Illinois** provides critical public oversight of Illinois' prisons, jails, and juvenile correctional facilities. As it has for more than a century, the Association promotes fair, humane, and effective sentencing and correctional policies, addresses inmate concerns, and provides

Illinois citizens and decision-makers with information needed to improve criminal and juvenile justice.

JustChildren, a project of the Legal Aid Justice Center, with offices in Charlottesville, Richmond, and Petersburg, is Virginia's largest children's law program. We work to reform Virginia's juvenile justice system in such areas as access to counsel, conditions of confinement, juvenile reentry, and juvenile transfer. JustChildren's goal is to keep more children in school, off the streets, and out of courts and prisons. In 2005, we helped to pass a law requiring counsel for youth at their initial detention hearings. We currently lead a statewide legislative campaign to reduce the number of youth who are tried and sentenced as adults. JustChildren also represents youth in juvenile prisons seeking access to more appropriate services and youth tried as adults, who have blended sentences of juvenile and adult time, to obtain reduction or elimination of the adult time. Working with these youth, many of whom have been convicted of serious felonies, we see how rehabilitation can transform a youth's behavior and attitude. Boys and girls involved in extensive dangerous behaviors have matured, turned their lives around, and persuaded Virginia judges that they no longer need to serve lengthy adult sentences.

The **Justice for Children Project** is an educational and interdisciplinary research project housed within The Ohio State University Michael E. Moritz College of Law. Begun in January 1998, the Project's mission is to explore ways in which the law and legal reform may be used to redress systemic

problems affecting children. The Justice for Children Project has two primary components: original research and writing in areas affecting children and their families, and direct legal representation of children and their interests in the courts. Through its scholarship, the Project builds bridges between theory and practice by providing philosophical support for the work of children's rights advocates. By its representation of individual clients through the Justice for Children Practicum and through its amicus work, the Justice for Children Project strives to advance the cause of children's rights in delinquency, status offense, abuse, neglect, and other legal proceedings affecting children's interests.

Juvenile Justice Project of Louisiana (JJPL) is the only statewide, non-profit advocacy organization focused on reform of the juvenile justice system in Louisiana. Founded in 1997 to challenge the way the state handles court involved youth, JJPL pays particular attention to the high rate of juvenile incarceration in Louisiana and the conditions under which children are incarcerated. Through direct advocacy, research and cooperation with state run agencies, JJPL works to both improve conditions of confinement and indentify sensible alternatives to incarceration. JJPL also works to ensure that children's rights are protected at all stages of juvenile court proceedings, from arrest through disposition, post-disposition and appeal, and that the juvenile and adult criminal justice systems take into account the unique developmental differences between youth and adults in enforcing these rights. JJPL continues to work to build the capacity of Louisiana's juvenile public defenders by providing

support, consultation and training, as well as pushing for system-wide reform and increased resources for juvenile public defenders.

The **Juvenile Rights Advocacy Project (JRAP)** is curricular law clinic, based at Boston College Law School since 1995. JRAP represents youth, with a focus on girls, who are in the delinquency or status offense systems, across systems and until the youth reach majority. JRAP attorneys use legal system to access social services and community supports for youth, hold systems accountable, and reduce the use of incarceration. JRAP also conducts research and policy advocacy for youth in the justice system. Among its work, JRAP seeks to develop and model programs for delinquent girls that reduce the use of incarceration and detention, and prompt systems to work collaboratively to shore up community resources supporting youth.

The **Kids First Law Center** is a nonprofit public interest organization for children in Cedar Rapids, Iowa. Kids First opened in January 2005 and provides free legal counsel to children in high-conflict custody and divorce cases. Kids First focuses on the needs and rights of children placed in the middle of conflict. The organization strives to make children's voices heard in the court system. We believe judges and attorneys should seek to understand situations from the child's perspective. Because of their developmental stages and comprehension abilities, children should be treated differently than adults in the court system.

The **Mid-Atlantic Juvenile Defender Center (MAJDC)** is one of nine regional centers created by the National Juvenile Defender Center in 2000. MAJDC is a multi-faceted juvenile defense resource center serving the District of Columbia, Maryland, Puerto Rico, Virginia and West Virginia. We are committed to working within communities to ensure excellence in juvenile defense and promote justice for all children. MAJDC promotes policy development in the region through conducting state based assessments of access to counsel and quality of representation in delinquency proceedings. MAJDC also coordinates training programs for defenders, provides technical assistance and encourages the development of oversight and accountability in the justice system.

The **National Association of Counsel for Children (NACC)** is a non-profit child advocacy and professional membership association dedicated to enhancing the well-being of America's children. Founded in 1977, the NACC is a multidisciplinary organization with approximately 2200 members representing all 50 states, DC, and several foreign countries. The NACC works to improve the delivery of legal services to children, families, and agencies; advance the rights and interests of children; and develop the practice of law for children and families as a sophisticated legal specialty. NACC programs include training and technical assistance, the national children's law resources center, the attorney specialty certification program, the model children's law office project, policy advocacy, and the amicus curiae program. Through the amicus curiae program, NACC has filed numerous briefs involving

the legal interest of children in state and federal appellate courts and the Supreme Court of the United States.

Founded in 1977, the **National Association of Counsel for Children (NACC)** is a 501(c)(3) non-profit child advocacy and professional membership association dedicated to enhancing the well being of America's children. The NACC works to strengthen the delivery of legal services to children, enhance the quality of legal services affecting children, improve courts and agencies serving children, and advance the rights and interests of children. NACC programs which serve these goals include training and technical assistance, the national children's law resource center, the attorney specialty certification program, the model children's law office program, policy advocacy, and the *amicus curiae* program. Through the *amicus curiae* program, the NACC has filed numerous briefs involving the legal interests of children in state and federal appellate courts and the Supreme Court of the United States. The NACC uses a highly selective process to determine participation as *amicus curiae*. *Amicus* cases must past staff and Board of Directors review using the following criteria: the request must promote and be consistent with the mission of the NACC; the case must have widespread impact in the field of children's law and not merely serve the interests of the particular litigants; the argument to be presented must be supported by existing law or good faith extension the law; there must generally be a reasonable prospect of prevailing. The NACC is a multidisciplinary organization with approximately 2000 members representing all 50 states and the

District of Columbia. NACC membership is comprised primarily of attorneys and judges, although the fields of medicine, social work, mental health, education, and law enforcement are also represented.

The **National Center for Youth Law (NCYL)** is a private, non-profit organization devoted to using the law to improve the lives of poor children nation-wide. For more than 30 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support and opportunities they need to become self-sufficient adults. NCYL provides representation to children in cases that have a broad impact. NCYL also engages in legislative and administrative advocacy to provide children a voice in policy decisions that affect their lives. NCYL supports the advocacy of others around the country through its legal journal, *Youth Law News*, and by providing trainings and technical assistance. NCYL has participated in litigation that has improved the quality of foster care in numerous states, expanded access to children's health and mental health care, and reduced reliance on the juvenile justice system to address the needs of youth in trouble with the law. NCYL also works to protect the rights of children in juvenile and adult criminal justice systems, at all stages of the proceedings, and to ensure that they are treated fairly consistent with their age and stage of development.

The mission of the **National Juvenile Justice Network (NJJN)** is to enhance the capacity of state-based juvenile justice coalitions and organizations to advocate for state and federal laws,

policies and practices that are fair, equitable and developmentally appropriate for all children, youth and families involved in, or at risk of becoming involved in, the justice system. NJJN currently comprises forty members in thirty-three states all of which seek to establish effective and appropriate juvenile justice systems. NJJN holds that youth are developmentally different from adults and a result should not be transferred into the adult criminal justice system where they are subject to extreme and harsh sentences such as life without the possibility of parole.

The **Northeast Regional Juvenile Defender Center (NRJDC)** is dedicated to increasing access to justice for and the quality of representation afforded to children caught up in the juvenile and criminal justice systems. Housed jointly at Rutgers Law School - Newark and the Defender Association of Philadelphia, the NRJDC provides training, support, and technical assistance to juvenile defenders in Pennsylvania, New Jersey, New York, and Delaware. The NRJDC also works to promote effective and rational public policy in the areas of juvenile detention and incarceration reform, disproportionate confinement of minority children, juvenile competency and mental health, and the special needs of girls in the juvenile justice system.

The **Pacific Juvenile Defender Center** is a regional affiliate of the National Juvenile Defender Center. Members of the Center include juvenile trial lawyers, appellate counsel, law school clinical staff, attorneys and advocates from nonprofit law centers working to protect the rights of children in juvenile

delinquency proceedings in California and Hawaii. The Center engages in appellate advocacy, public policy and legislative discussions with respect to the treatment of children in the juvenile and criminal justice systems. Center members have extensive experience with cases involving serious juvenile crime, the impact of adolescent development on criminality, and the differences between the juvenile and adult criminal justice systems. These cases, involving the imposition of Life Without the Possibility of Parole on juvenile offenders, present questions that are at the core of the Pacific Juvenile Defender Center's work.

The **Pendulum Foundation** is a non-profit organization committed to educating the public about the issues surrounding children convicted as adults. The goal of the Foundation is to ensure – whether inside or outside of prison – happy, healthy, well-adjusted and productive adults. Located in Colorado, the Pendulum Foundation serves kids who are serving life in prison. The Foundation is committed to educating the public about the issues surrounding children convicted and sentenced as adults. We are also committed to taking into prison MRT, a groundbreaking cognitive behavior program, which will help transform the lives of young prisoners. Scientific research has decreed that children are indeed different than adults. The justice system agrees – by sentencing many of these kids to harsher sentences than their adult counterparts. The children who've received life sentences in Colorado are not the worst of the worst. We have a youth who is serving life for a hit and run. Two others who killed their abusers after all social service agencies,

law enforcement and professionals failed to help. Many of our kids never killed anybody. Twenty years ago these young lifers would have received treatment, time in a youth facility and would now be productive, taxpaying members of society. The Pendulum Foundation has been instrumental in ending JLWOP in Colorado and in creating the first juvenile clemency board in the nation, but those are tiny steps and will have no effect on those who will die behind bars. Visit these prisons. Talk to these kids – now men. You'll see for yourself that life without parole for a child is indeed cruel and unusual punishment.

The **Pennsylvania Prison Society** is strongly moved to join JLC and other organizations in addressing the issue of sentencing juvenile offenders to life without possibility of parole. Since its founding more than two centuries ago, the Prison Society has advocated for a humane system of corrections: one that recognizes the inherent ability of men and women to change their attitudes and behavior. No group exemplifies better the concept of rehabilitation than juvenile offenders. We see the condemnation of juveniles to life without parole as an unwarranted abdication of faith in humanity -- a terminal sentence that offends our sense of humane treatment, violates the spirit of the Supreme Court with respect to its ruling relating to death sentences for juveniles, and flies in the face of neurological findings on brain development and criminal culpability. The Prison Society has a long-term positive working relationship with life-sentenced inmates across the Commonwealth and particularly those arrested when they were juveniles. For the

past twelve years, the Prison Society has been involved in litigation regarding the Board of Pardons, which impacts lifers seeking commutation—the only avenue available to them now for release from prison. Most recently, the agency has been working with members of the General Assembly to craft legislation to study the issue of juveniles with life sentences in Pennsylvania as well as pursuing parole options.

The **Public Defender Service for the District of Columbia (PDS)** is a federally funded, independent public defender organization; for almost 40 years, PDS has provided quality legal representation to indigent adults and children facing a loss of liberty in the District of Columbia justice system. PDS provides legal representation to many of the indigent children in the most serious delinquency cases, including those who have special education needs due to learning disabilities. PDS also represents classes of youth, including a class consisting of children committed to the custody of the District of Columbia.

The **Southern Juvenile Defender Center (SJDC)** works to ensure excellence in juvenile defense and secure justice for children in delinquency and criminal proceedings in the southeastern United States. SJDC provides training and resources to juvenile defenders, and advocates for systemic reforms designed to give children the greatest opportunities to grow and thrive. Through public education and advocacy, SJDC encourages attorneys and judges to rely upon scientific research

concerning adolescent brain development in cases involving youthful defendants. SJDC is based at the **Southern Poverty Law Center (SPLC)** in Montgomery, Alabama. Founded in 1971, SPLC has litigated numerous civil rights cases on behalf of incarcerated children and other vulnerable populations.

The **Support Center for Child Advocates** (*Child Advocates*) is Philadelphia's volunteer lawyer program for abused and neglected children in Philadelphia, representing 800 children each year. For all the children committed to *Child Advocates* care, lawyers and social workers advocate to ensure safety, health, education, family, permanency and access to justice. Respected for diligent and effective advocacy, *Child Advocates* moves both public systems to deliver entitled services and private systems to open their doors to needy children and their families. We know that child victims, especially poor children and including many whom we have represented, may act out criminally in response to their victimization, poverty, family background and their own developmental deficits.

Voices for Georgia's Children is an independent, non-profit organization whose mission is to substantially improve outcomes for Georgia's children by engaging lawmakers and the public into building a sustained, comprehensive, long-term agenda to impact the lives of our kids in five distinct areas: health, safety, education, connectedness and employability. Through advocacy, original research and analysis, Voices assists leaders and citizens of Georgia in making sound decisions on policy,

investment and systems that serve children and youth.

The **Youth Law Center** is a San Francisco-based national public interest law firm working to protect the rights of children at risk of or involved in the juvenile justice and child welfare systems. Since 1978, Youth Law Center attorneys have represented children in civil rights and juvenile court cases in California and two dozen other states. The Center's attorneys are often consulted on juvenile policy matters, and have participated as amicus curiae in cases around the country involving important juvenile system issues. Youth Law Center attorneys have written widely on a range of juvenile justice, child welfare, health and education issues, and have provided research, training, and technical assistance on legal standards and juvenile policy issues to public officials in almost every State. The Center has long been involved in public policy discussions, legislation and court challenges involving the treatment of juveniles as adults. Center attorneys were consultants in the John D. and Catherine T. MacArthur Foundation project on adolescent development, and have recently authored a law review article on juvenile competence to stand trial. These cases, challenging the imposition of Life Without the Possibility of Parole on a 13 year-old and a 17 year-old, for crimes not resulting in death, fit squarely with in the Center's long-term interest and expertise.

Individuals

Mary Berkheiser is a Professor of Law at the William S. Boyd School of Law, University of Nevada, Las Vegas. Professor's Berkheiser's area of specialization is juvenile law and the rights of juveniles accused of committing crimes. Professor Berkheiser directs the Juvenile Justice Clinic in the law school's Thomas & Mack Legal Clinic and teaches Criminal Law and Criminal Procedure - Adjudication. In the clinic, law students are certified to practice law before the courts of the State of Nevada under the supervision of Professor Berkheiser. Those students represent juveniles in proceedings in the juvenile and state district courts, advocating for their legal rights and their expressed interests. In addition, Professor Berkheiser and her students have drafted legislation and testified at legislative hearings on matters affecting juveniles in the State of Nevada. Professor Berkheiser is the co-director of the Western Juvenile Defender Center and a member of the Clark County Juvenile Justice Administration's Juvenile Detention Alternatives Initiative (JDAI) team and of the JDAI Girls Initiative Workgroup. Professor Berkheiser has authored two articles on juvenile issues – *Capitalizing Adolescence: Juvenile Offenders on Death Row*, 59 Miami L. Rev. 135 (2005), and *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 Fla. L. Rev. 577 (2002) – and is at work on a third article that critiques juvenile plea bargaining.

Shay Bilchik is the founder and Director of the Center for Juvenile Justice Reform at Georgetown University Public Policy Institute. The Center's purpose is to focus the nation public agency

leaders, across systems of care and levels of government, on the key components of a strong juvenile justice reform agenda. This work is carried out through the dissemination of papers on key topics, the sponsorship of symposia, and a Certificate Program at Georgetown providing public agency leaders with opportunities for short, but intensive, periods of study. Prior to joining the Institute on March 1, 2007, Mr. Bilchik was the President and CEO of the Child Welfare League of America, a position he held from February of 2000. Shay led CWLA in its advocacy on behalf of children through his public speaking, testimony and published articles, as well as collaborative work with other organizations. He worked closely with the CWLA Board of Directors, staff, and its public and private agency members on issues impacting the well-being of children and families. In 2001, 2004, 2005 and 2006, he was named among The NonProfit Times Power and Influence Top 50 for making his mark in the public policy arena and championing child welfare issues. Prior to his tenure at CWLA, Shay headed up the Office of Juvenile Justice and Delinquency Prevention (OJJDP) in the U.S. Department of Justice, where he advocated for and supported a balanced and multi-systems approach to attacking juvenile crime. Before coming to the nation's capital, Mr. Bilchik was an Assistant State Attorney in Miami, Florida from 1977-1993, where he served as a trial lawyer, juvenile division chief, and Chief Assistant State Attorney. Mr. Bilchik earned his B.S. and J.D. degrees from the University of Florida. As a former prosecutor and U.S. Department of Justice official in charge of juvenile justice and delinquency prevention issues he has

learned that overly punitive sentencing policies do not work to either make our communities safe or rehabilitate offenders. In fact, research on juvenile offending, sentencing of juveniles as adult offenders, and adolescent brain development teach us that these disproportionate responses actually exacerbate juvenile offending patterns. JLWOP is a prime example of this simplistic thinking and ineffective public policy - a policy that is not shared by any developed country in the world.

Tamar Birckhead is an Assistant Professor of Law at the University of North Carolina at Chapel Hill where she teaches the Juvenile Justice Clinic and the Criminal Lawyering Process. Her research interests focus on issues related to juvenile justice policy and reform, criminal law and procedure, and indigent criminal defense. Professor Birckhead's 2008 article on raising the age of juvenile court jurisdiction from 16 to 18 in North Carolina has received significant attention at both the state and national levels. The Raleigh *News & Observer* published an Op-Ed written by Professor Birckhead on the subject of raising the age, and she has been interviewed by radio and print reporters across the state on her findings. She has testified before the N.C. Governor's Crime Commission on the history of raising the age of juvenile court jurisdiction, and Action for Children North Carolina, the state's premier child advocacy organization, issued a press release and fact sheet on her research. In addition, The Campaign for Youth Justice, a national organization dedicated to ending the practice of trying, sentencing, and incarcerating youth under 18 in the adult criminal justice system, highlighted

Professor Birckhead's research in their newsletter and interviewed her for their weekly radio program, Juvenile Justice Matters. Prior to joining the UNC School of Law faculty in 2004, Professor Birckhead practiced for ten years as a public defender, representing indigent criminal defendants -- including juveniles -- in the Massachusetts trial and appellate courts as a staff attorney with the Committee for Public Counsel Services and in federal district court in Boston as an Assistant Federal Public Defender. Professor Birckhead has defended clients in a wide variety of criminal cases, from violent felony offenses in state court to acts of terrorism in federal court. Licensed to practice in North Carolina, New York and Massachusetts, Professor Birckhead has been a frequent lecturer at continuing legal education programs across the U.S. as well as a faculty member at the Trial Advocacy Workshop at Harvard Law School. She is Vice President of the Board for the North Carolina Center on Actual Innocence and has been appointed to the Executive Council of the Juvenile Justice and Children's Rights Section of the North Carolina Bar Association. She is also a member of the Advisory Board for the North Carolina Juvenile Defender as well as a member of the Criminal Defense Section and the Juvenile Defender Section of the North Carolina Academy of Trial Lawyers. Professor Birckhead received her B.A. degree in English Literature with Honors from Yale University and her J.D. with Honors from Harvard Law School, where she served as Recent Developments Editor of The Harvard Women's Law Journal.

Professor **Laura Cohen** earned a B.A. summa cum laude from Rutgers College and a J.D. from Columbia, where she was managing editor of the Columbia Human Rights Law Review. She is the former director of training for the New York City Legal Aid Society's Juvenile Rights Division, where she oversaw both the attorney training program and public policy initiatives relating to juvenile justice and child welfare. She also has served as a senior policy analyst for the Violence Institute of New Jersey; deputy court monitor in Morales Feliciano v. Hernandez Colon, a prisoners' rights class action in the U.S. District Court in San Juan, Puerto Rico; adjunct professor at New York Law School; and staff attorney for the Legal Aid Society. Professor Cohen codirects the Northeast Regional Juvenile Defender Center, an affiliate of the National Juvenile Defender Center, which is dedicated to improving the quality of representation accorded children in juvenile court. Her scholarly interests include juvenile justice, child welfare, and the legal representation of children and adolescents. Professor Cohen teaches doctrinal and clinical courses relating to juvenile justice law and policy, is a team leader of the MacArthur Foundation-funded New Jersey Juvenile Indigent Defense Action Network, and has published numerous articles on juvenile justice and child welfare.

Michele Deitch, J.D., M.Sc., teaches juvenile justice policy and criminal justice policy at the University of Texas—Lyndon B. Johnson School of Public Affairs and at the University of Texas School of Law. She is the lead author of *From Time Out to Hard Time: Young Children in the Adult Criminal*

Justice System (LBJ School of Public Affairs, 2009). She served as part of the legal team that represented Christopher Pittman in his petition of certiorari to the United State Supreme Court in 2008 (*Pittman v. South Carolina*), challenging the constitutionality of a mandatory 30-year sentence without possibility of parole imposed on a 12-year old child. Professor Deitch has served on a Blue Ribbon Task Force charged with proposing reforms to the Texas juvenile justice system, and she has been a federal court appointed monitor of conditions in the Texas adult prison system. She also served as the drafter of the American Bar Association's proposed standards on the legal treatment of prisoners.

Barbara Fedders is a clinical assistant professor at the University of North Carolina School of Law. Prior to joining the UNC faculty in January 2008, Professor Fedders was a clinical instructor at the Harvard Law School Criminal Justice Institute for four years. Prior to that, she worked for the Massachusetts Committee for Public Counsel Services as a Soros Justice Fellow and staff attorney. She began her career in clinical work at the Juvenile Rights Advocacy Project at Boston College Law School. As a law student, Professor Fedders was a Root-Tilden-Snow scholar and co-founded the NYU Prisoners' Rights and Education Project. She is a member of the advisory boards of the Prison Policy Initiative and the Equity Project.

Professor **Barry Feld** is Centennial Professor of Law, University of Minnesota Law School. He received his B.A. from the University of Pennsylvania; his J.D. from University of Minnesota

Law School; and his Ph.D. in sociology from Harvard University. He has written eight books and about seventy law review and criminology articles and book chapters on juvenile justice with a special emphasis on serious young offenders, procedural justice in juvenile court, adolescents' competence to exercise and waive *Miranda* rights and counsel, youth sentencing policy, and race. Feld has testified before state legislatures and the U. S. Senate, spoken on various aspects of juvenile justice administration to legal, judicial, and academic audiences in the United States and internationally. He worked as a prosecutor in the Hennepin County (Minneapolis) Attorney's Office and served on the Minnesota Juvenile Justice Task Force (1992 -1994), whose recommendations the 1994 legislature enacted in its revisions of the Minnesota juvenile code. Between 1994 and 1997, Feld served as Co-Reporter of the Minnesota Supreme Court's Juvenile Court Rules of Procedure Advisory Committee.

Brian J. Foley is a Visiting Associate Professor of Law at Boston University School of Law. He teaches and writes in the area of criminal law and procedure. *See, e.g.*, *Policing from the Gut: Anti-Intellectualism in American Criminal Procedure*, 69 MARYLAND L. REV. __ (2010) (forthcoming); *Until We Fix the Labs and Fund Criminal Defendants: Fighting Bad Science With Storytelling*, 43 TULSA L. REV. 397 (2007) (invited - symposium on forensic scientific evidence and actual innocence); *Guantanamo and Beyond: Dangers of Rigging the Rules*, 97 J. CRIM. L. & CRIMINOLOGY 1009 (2007). Professor Foley co-authored a 50-state survey of law concerning juvenile life without parole that was

published as an Appendix to Connie de la Vega and Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F L. REV. 984 (2008). He has done pro bono work against juvenile life without parole sentences, co-authoring the following party brief and amicus briefs: *Brief for Appellant*, in Commonwealth of Pennsylvania vs. Edward Batzig, Superior Court of Pennsylvania Sitting in Philadelphia, EDA 2005, No. 1711 (with Defender Association of Philadelphia, the Juvenile Law Center, and the Center for Law and Global Justice, University of San Francisco School of Law), May, 2008; *Brief of Amicus Curiae Defender Association of Philadelphia and Juvenile Law Center on Behalf of Aaron Phillips,* in Commonwealth of Pennsylvania v. Aaron Phillips, Pennsylvania Superior Court, Eastern District, EDA 2005, No. 2729 (with Defender Association of Philadelphia and Juvenile Law Center); *Brief of Amicus Curiae Defender Association of Philadelphia and Juvenile Law Center on Behalf of John Pace,* in Commonwealth of Pennsylvania v. John Pace, Pennsylvania Superior Court, Eastern District, EDA 2006, No. 921.

Martin Guggenheim is the Fiorello La Guardia Professor of Clinical Law at N.Y.U. Law School, where he has taught since 1973. He served as Director of Clinical and Advocacy Programs from 1988 to 2002 and also was the Executive Director of Washington Square Legal Services, Inc. from 1987 to 2000. He has been an active litigator in the area of children and the law and has argued leading cases on juvenile delinquency and termination of parental rights in the Supreme Court of the United States. He

is also a well-known scholar whose books include "What's Wrong with Children's Rights" published by Harvard University Press in 2005 and "Trial Manual for Defense Attorneys in Juvenile Court," published by ALI-ABA in 2007 which was co-authored with Randy Hertz and Anthony G. Amsterdam. He has won numerous national awards including in 2006 the Livingston Hall Award given by the American Bar Association for his contributions to juvenile justice.

Kristin Henning is a Professor of Law and Co-Director of the Juvenile Justice Clinic at the Georgetown Law Center. Prior to her appointment to the Georgetown faculty, Professor Henning was the Lead Attorney for the Juvenile Unit of the Public Defender Service (PDS) for the District of Columbia, where she represented clients and helped organize a specialized Unit to meet the multi-disciplinary needs of children in the juvenile justice system. Professor Henning has been active in local, regional and national juvenile justice reform, serving on the Board of the Mid-Atlantic Juvenile Defender Center, the Board of Directors for the Center for Children's Law and Policy, and the D.C. Department of Youth Rehabilitation Services Advisory Board and Oversight Committee. She has served as a consultant to organizations such as the New York Department of Corrections and the National Prison Rape Elimination Commission, and was appointed as a reporter for the ABA Task Force on Juvenile Justice Standards. Professor Henning has published a number of law review articles on the role of child's counsel, the role of parents in delinquency cases, confidentiality and victims' rights in juvenile courts, and therapeutic jurisprudence in the juvenile justice

system. Professor Henning also traveled to Liberia in 2006 and 2007 to aid the country in juvenile justice reform and was awarded the 2008 Shanara Gilbert Award by the Clinical Section of the Association of American Law Schools in May for her commitment to social justice on behalf of children. Professor Henning received her B.A. from Duke University, a J.D. from Yale Law School, and an LL.M. from Georgetown Law Center. Professor Henning was a Visiting Professor of Law at NYU Law School during the Spring semester of 2009.

Miriam Aroni Krinsky is a Lecturer at the UCLA School of Public Policy and also an Adjunct Professor at Loyola Law School. She sits on the ABA Youth at Risk Commission, the California Blue Ribbon Commission on Foster Care, the California Judicial Council, and numerous federal, state and local policy groups. She has testified before legislative, governmental and judicial bodies, authored over 50 articles, and lectured nationwide on criminal law, child welfare, sentencing, and related topics. Ms. Krinsky previously served as the Executive Director of the Children's Law Center of Los Angeles – a nonprofit legal services organization that serves as counsel for over 20,00 children in foster care. Prior to that, she spent 15 years as a federal prosecutor – both in Los Angeles and on an organized crime drug task force in Maryland. During her tenure with the Department of Justice, Ms. Krinsky supervised the LA US Attorneys Office General Crimes and Criminal Appellate Sections, chaired the Solicitor General's Advisory Group on Appellate Issues, served on the AG's Advisory Committee on Sentencing, and received AG Reno's

highest national award for appellate work. Ms. Krinsky has also been involved in extensive bar and community activities, including serving as President of the LA County Bar Association.

Wallace Mlyniec is the former Associate Dean of Clinical Education and Public Service Programs, and currently the Lupo-Ricci Professor of Clinical Legal Studies, and Director of the Juvenile Justice Clinic at Georgetown University Law Center. He teaches courses in family law and children's rights and assists with the training of criminal defense and juvenile defense fellows in the Prettyman Legal Internship Program. He is the author of numerous books and articles concerning criminal law and the law relating to children and families. Wallace Mlyniec received a Bicentennial Fellowship from the Swedish government of study their child welfare system, the Stuart Stiller Award for public service, and the William Pincus award for contributions to clinical education. He holds his B.S. from Northwestern University and his J.D. from Georgetown University. He is the Vice Chair of the Board of Directors of the National Juvenile Defender Center and former chair of the American Bar Association Juvenile Justice Committee.

Eddie Ohlbaum is a trial lawyer who joined the Temple Law School Faculty in Spring 1985. The first holder of Temple's first chair in trial advocacy, the Jack E. Feinberg Professorship of Litigation, he was awarded the prestigious Richard S. Jacobson Award, given annually by the Roscoe Pound Foundation to one professor for "demonstrated excellence in teaching trial advocacy" in 1997. He is a

former senior trial lawyer with the Defender Association of Philadelphia. Professor Ohlbaum is the senior member of the coaching team of the law school's championship mock trial team—which has won 5 national championships in the past thirteen years—and the architect of Temple's unique L.L.M. in Trial Advocacy. His programs have won awards from the American College of Trial Lawyers and the Committee on Professionalism of the American Bar Association. The author of three books, Professor Ohlbaum is a frequent speaker on evidence and advocacy at key international and domestic conferences.

Jeffrey Shook is an Assistant Professor of Social Work and an Affiliated Assistant Professor of Law at the University of Pittsburgh. He received his Ph.D. in Social Work and Sociology and MSW from the University of Michigan, his JD from American University, and his BA in Economics from Grinnell College. His research and teaching focus broadly on the intersection of law, policy, and practice in the lives of children and youth. Specifically, he has conducted research and published on the transfer of juveniles to the criminal justice system, the administration of juvenile justice, the characteristics of youthful offenders, the movement of youth across child serving systems, and outcomes of youth who have aged out of the child welfare system. He has also testified in a variety of public forums on these issues, including the Michigan House of Representatives (Subcommittee on DOC Appropriations), the Pennsylvania Senate (Judiciary Committee), U.S. Representative John Conyers

(Public Hearing – Detroit, MI), and the DHS Task Force on Juvenile Waiver (Michigan).

Abbe Smith is Professor of Law and Co-Director of the Criminal Justice Clinic and E. Barrett Prettyman Fellowship Program at Georgetown Law School, where she has taught since 1996. Prior to coming to Georgetown, Professor Smith was the Deputy Director of the Criminal Justice Institute, Clinical Instructor, and Lecturer on Law at Harvard Law School. In addition to Georgetown and Harvard, Professor Smith has taught at City University New York Law School, Temple University School of Law, American University Washington College of Law, and the University of Melbourne Law School, where Professor Smith was a Senior Fulbright Scholar. Professor Smith teaches and writes in the areas of criminal defense, legal ethics, juvenile justice, and clinical legal education. In addition to numerous articles in law journals, she is the author of CASE OF A LIFETIME: A CRIMINAL DEFENSE LAWYER'S STORY (Palgrave MacMillan 2008), co-author with Monroe Freedman of UNDERSTANDING LAWYERS' ETHICS (Lexis-Nexis 2004), and a contributing author of WE DISSENT (Michael Avery, ed., NYU Press, 2008) and LAW STORIES (Gary Bellow & Martha Minow, eds., University of Michigan Press, 1996). Prior to becoming a law teacher, Professor Smith was a public defender in Philadelphia. She continues to be actively engaged in criminal defense practice and frequently presents at public defender and legal aid training programs in the US and abroad.

Michael F. Sturley is the Stanley D. and Sandra J. Rosenberg Centennial Professor at the University of Texas Law School, where he has been a member of the faculty for 25 years. In this Court, he represented Christopher Pittman, who two terms ago challenged his harsh adult sentence for offenses committed when he was only twelve years old. See Pittman v. South Carolina, 128 S. Ct. 1872 (2008) (No. 07-8436) (denying cert. to State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)).

Barbara Bennett Woodhouse is L.Q.C. Lamar Professor of Law at Emory University and Co-Director of the Barton Child Law and Policy Clinic, and she is also David H. Levin Chair in Family Law (Emeritus) at University of Florida. For twenty five years, she has been teaching, researching and writing about justice for children. Before joining the Emory faculty, she was co-founder of the multidisciplinary Center for Children's Policy Practice and Research at University of Pennsylvania and founder of the Center on Children and Families at University of Florida. She has published many articles, book chapters and an award winning book on children's rights, as well as participating in appellate advocacy in cases involving the rights of children and juveniles.

AMICUS CURIAE BRIEF

(25) (24)

Nos. 08-7412, 08-7621

In The
Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writs of Certiorari to the Florida First District Court of Appeal

BRIEF FOR THE STATES OF LOUISIANA, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

JAMES D. "BUDDY" CALDWELL
LOUISIANA ATTORNEY GENERAL
KYLE DUNCAN*
APPELLATE CHIEF
LOUISIANA DEPARTMENT OF JUSTICE
P.O. BOX 94005
BATON ROUGE, LOUISIANA 70804
(225) 326-6008
Counsel for State *Amici Curiae*
[Additional counsel on inside cover]

**Counsel of Record*

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Troy King
Attorney General of Alabama
500 Dexter Avenue
Montgomery, Alabama 36117

Richard S. Gebelein
Chief Deputy Attorney General of Delaware
820 North French Street
Wilmington, Delaware 19801

Gregory F. Zoeller
Attorney General of Indiana
302 W. Washington Street
IGC-South, Fifth Floor
Indianapolis, Indiana 46204

Jack Conway
Kentucky Attorney General
700 Capitol Ave, Suite 118
Frankfort, Kentucky 40601

Michael A. Cox
Michigan Attorney General
P.O. Box 30212
Lansing, Michigan 48909

Jim Hood
Attorney General of Mississippi
P.O. Box 220
Jackson, Mississippi 39205

Roy Cooper
Attorney General of North Carolina
P.O. Box 629
Raleigh, North Carolina 27602

Wayne Stenehjem
Attorney General of North Dakota
600 E. Boulevard Ave.
Bismarck, North Dakota 58505

W.A. Drew Edmondson
Attorney General of Oklahoma
313 N.E. 21st Street
Oklahoma City, Oklahoma 73105-4894

Thomas W. Corbett, Jr.
Attorney General Commonwealth of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120

Henry D. McMaster
Attorney General of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211

Marty J. Jackley
Attorney General State of South Dakota
1302 E. Highway 14, Ste 1
Pierre, South Dakota 57501-8501

Robert E. Cooper, Jr.
Attorney General and Reporter of Tennessee
P.O. Box 20207
Nashville, Tennessee 37202

Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Mark L. Shurtleff
Utah Attorney General
Utah State Capitol Suite #230
Salt Lake City, Utah 84114

William C. Mims
Attorney General of Virginia
900 East Main Street
Richmond, Virginia 23219

Robert M. McKenna
Attorney General of Washington
1125 Washington Street
P.O. Box 40100
Olympia, Washington 98504-0100

Bruce A. Salzburg
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF STATE *AMICI* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. OUTSIDE THE DEATH-PENALTY CONTEXT, THE EIGHTH AMENDMENT STRONGLY DEFERS TO STATE SENTENCING JUDGMENT 4

II. IN THE VAST MAJORITY OF STATES, VIOLENT JUVENILES MAY BE TRIED AS ADULTS AND SENTENCED TO LIFE-WITHOUT-PAROLE. 8

A. Legislation in Forty-Five States Allows Life-Without-Parole for Violent Juvenile Offenders. 10

(1). Seven States allow the sentence for homicide crimes only. 10

(2). Thirty-eight States also allow the sentence for non-homicide crimes. 13

(3). Only four States specifically disallow life-without-parole, while still allowing lengthy mandatory terms. 22

(4). Both the District of Columbia and the federal government allow juvenile life-without-parole for non-homicide crimes. 24

B. Evolving Transfer Provisions Show that States Have Consciously Toughened Juvenile Sentencing. 25

III. STATE LEGISLATURES ARE BEST SITUATED TO SET JUVENILE SENTENCING POLICIES. 29

A. Officials Who Calibrate Juvenile Sentencing Must Remain Directly Accountable to Their Citizens. 30

B. States Have Crafted Juvenile Sentencing Policies that Wisely Balance Justice with Mercy. 33

CONCLUSION 38

TABLE OF AUTHORITIES

Federal Cases

Ewing v. California, 538 U.S. 11 (2003)..... 4, 6, 8, 10

Harmelin v. Michigan, 501 U.S. 957 (1991) ....passim

Harris v. Wright, 93 F.3d 581 (9th Cir. 1996)..... 6

Roper v. Simmons, 543 U.S. 551 (2005).....passim

Rummel v. Estelle, 445 U.S. 263 (1980) 4, 5, 6, 7

Solem v. Helm, 463 U.S. 277 (1983).....passim

United States v. Christian, 63 M.J. 205 (2006)..... 25

Woodson v. North Carolina, 428 U.S. 280 (1976)..... 5

State Cases

Shepherd v. Commonwealth, 251 S.W.3d 309 (Ky. 2008)..... 23

State v. Rauch, 13 P.3d 324 (Haw. 2000)..... 26

Federal Statutes

10 U.S.C. § 505(a)..... 25

10 U.S.C. § 856a..... 25

10 U.S.C. § 918..... 25

10 U.S.C. § 920..... 25

18 U.S.C. § 1111..... 24

18 U.S.C. § 1113..... 24

18 U.S.C. § 113..... 24

18 U.S.C. § 2111..... 24

18 U.S.C. § 2113..... 24

18 U.S.C. § 2241 24
18 U.S.C. § 3559 25
18 U.S.C. § 5032 24
D.C. CODE ANN. § 16-2305 24
D.C. CODE ANN. § 22-1804a(a)(2) 24
D.C. CODE ANN. § 22-2104 24
D.C. CODE ANN. § 22-2106 24
D.C. CODE ANN. § 22-3020(a) 24
D.C. CODE ANN. § 22-3153(a) 24
JUVENILE JUSTICE ACCOUNTABILITY AND IMPROVEMENT ACT OF 2009, H.R. 2289, 111th Cong. 25

State Statutes

18 PA. CONS. STAT. § 3121(e)(2) 20
2006 COLO. LEGIS. SERV. Ch. 228 34
2009 N.M. Laws, ch. 11, Sec. 1 12
2009 TEX. SESS. LAW SERV. Ch. 765 ..... 23, 34
42 PA. CONS. STAT. § 6302 20
42 PA. CONS. STAT. § 9714(a)(2) 20
42 PA. CONS. STAT. §§ 6355(a) 20
61 PA. CONS. STAT. § 331.21(a) 20
705 ILL. COMP. STAT. 405/5-805 15
730 ILL. COMP. STAT. 5/5-8-1 15
74 DEL. LAWS c. 106, §§ 28, 33 35
ALA. CODE § 12-15-203 13

ALA. CODE § 13A-5-9(c) 13
ALA. CODE § 13A-6-61 13
ALA. CODE § 13A-7-5 13
ALASKA STAT. § 12-55-015(g) 23
ALASKA STAT. § 41.12.030(a) 35
ARIZ. REV. STAT. § 13-1423 13
ARIZ. REV. STAT. § 13-501 13
ARK. CODE ANN. § 5-4-501(c) 14
ARK. CODE ANN. § 9-27-318 13
CAL. PENAL CODE § 1170.17 14
CAL. PENAL CODE § 667.7 14
COLO. REV. STAT. ANN. § 18-1.3-401(4)(b) 23, 34
CONN. GEN. STAT. ANN. § 46b-127 10
CONN. GEN. STAT. ANN. § 53A-35A 10
DEL. CODE ANN. tit. 10, § 1010(a)(1) 14
DEL. CODE ANN. tit. 10, § 921(2)(a) 14
DEL. CODE ANN. tit. 11, § 4205 14
DEL. CODE ANN. tit. 11, § 531 14
DEL. CODE ANN. tit. 11, § 636 14
DEL. CODE ANN tit. 11, § 773 14
FLA. STAT. ANN. § 794.011(3) 14
FLA. STAT. ANN. § 810.02(2) 14
FLA. STAT. ANN. § 985.56 14
GA. CODE ANN. § 15-11.30.2(4) 14

GA. CODE ANN. § 16-6-1(b) 14

GA. CODE ANN. § 17-10-7(b)(2) 14

H.B. 4518, 4594-95; S.B. 173-176, 1999 Leg., 95th Sess. (Mich. 2009) 35

HAW. REV. STAT. ANN. § 571-22(d) 11

HAW. REV. STAT. ANN. § 706-656(1) 11

HAW. REV. STAT. ANN. § 706-656(2) 11

HAW. REV. STAT. ANN. § 706-657 11

IDAHO CODE § 18-6104 15

IDAHO CODE § 18-6503 15

IDAHO CODE § 20-508 15

IDAHO CODE § 20-509 15

IND. CODE § 31-30-3-6(1) 15

IND. CODE § 35-50-2-8.5(a) 15

IOWA CODE § 232.45(6) 15

IOWA CODE § 709.2 15

IOWA CODE § 710.2 15

IOWA CODE § 902.1 15

KAN. STAT. ANN. § 21-4622 23

KAN. STAT. ANN. 21-4635(b) 23

KY. REV. STAT. ANN. § 640.040(1) 23

LA. CHILD. CODE art. 305 15

LA. CHILD. CODE art. 857(A) 15

LA. CHILD. CODE art. 857(B) 16

LA. REV. STAT. ANN. § 14:42(D)(1) 15

LA. REV. STAT. ANN. § 14:44 15

MASS. GEN. LAWS ANN. ch. 119 § 74 11

MASS. GEN. LAWS. ANN. ch. 265 § 2 11

MD. CODE ANN., CRIM. LAW § 3-303(d)(2) 16

MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-03(d)(1) 16

MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-06(a)(2) 16

ME. REV. STAT. ANN. tit. 15 § 3101(4) 11

ME. REV. STAT. ANN. tit. 17-a § 1251 11

MICH. COMP. LAWS § 333.7413(1) 16

MICH. COMP. LAWS § 712A.4 16

MICH. COMP. LAWS § 750.349(3) 16

MICH. COMP. LAWS § 750.529 16

MICH. COMP. LAWS § 764.27 16

MICH. COMP. LAWS § 769.1 16

MINN. STAT. § 260B.125(1) 16

MINN. STAT. § 609.055 16

MINN. STAT. § 609.3455(2) 16

MISS. CODE ANN. § 47-7-3(1)(a) 16

MISS. CODE ANN. § 43-21-157 16

MISS. CODE ANN. § 99-18-83 16

MISS. CODE ANN. § 99-19-81 16

MO. REV. STAT. § 195.214 17

MO. REV. STAT. § 195.218 17

MO. REV. STAT. § 195.222 17
MO. REV. STAT. § 195.223 17
MO. REV. STAT. § 211.071(1) 17
MO. REV. STAT. § 558.018 17
MONT. CODE ANN. § 41-5-206(1) 17
MONT. CODE ANN. § 41-5-2503(1)(a) 17
MONT. CODE ANN. § 45-5-303 17
MONT. CODE ANN. § 45-5-503 17
MONT. CODE ANN. § 46-18-202(2) 17
MONT. CODE ANN. § 46-18-219(1)(a)(i) 17
MONT. CODE ANN. § 46-18-220 17
MONT. CODE ANN. § 46-18-222(1) 17
N.C. GEN. STAT. § 14-7.12 19
N.C. GEN. STAT. § 15A-1340.16B(a) 19
N.C. GEN. STAT. § 15A-1340.16C 19
N.C. GEN. STAT. § 7B-2200 19
N.D. CENT. CODE § 12.1-04-01 19
N.D. CENT. CODE § 12.1-20-03 19
N.D. CENT. CODE § 12.1-32-01(1) 19
N.D. CENT. CODE § 27-20-34 19
N.H. REV. STAT. ANN. § 169-B:24(II) 19
N.H. REV. STAT. ANN. § 628:1(II) 19
N.H. REV. STAT. ANN. § 651.6(III)(e) 19
N.J. STAT. ANN. § 2A:4A-26 11

N.J. STAT. ANN. § 2C:11-3 11
N.M. STAT. § 31-18-14 12
N.M. STAT. § 31-18-15.2(A) 12
N.M. STAT. § 31-18-15.3(D) 12
N.Y. PENAL CODE § 30.00(2) 18
N.Y. PENAL CODE § 70.00(5) 18
N.Y. PENAL LAW § 135.25 18
N.Y. PENAL LAW § 30.00(1) 18
N.Y. PENAL LAW § 490.25(d) 18
NEB. REV. STAT. § 28-105 17
NEB. REV. STAT. § 28-303 17
NEB. REV. STAT. § 28-304 17
NEB. REV. STAT. § 28-313(2) 17
NEB. REV. STAT. § 28-319.01 17
NEB. REV. STAT. § 29-2204 17
NEB. REV. STAT. § 43-247 17
NEB. REV. STAT. § 43-276 17
NEV. REV. STAT. § 200.366 18
NEV. REV. STAT. § 200.400(4) 18
NEV. REV. STAT. § 207.010 18
NEV. REV. STAT. § 207.012 18
NEV. REV. STAT. § 62B.330 18
NEV. REV. STAT. § 62B.390(1) 18
NEV. SENATE BILL No. 235, § 2 35

OHIO REV. CODE ANN. § 2152.10(B) 19
OHIO REV. CODE ANN. § 2152.12 ..... 19, 36, 37, 38
OHIO REV. CODE ANN. § 2907.02 19
OHIO REV. CODE ANN. § 2971.03 19
OKLA. STAT. tit. 10A, § 2-5-204 19
OKLA. STAT. tit. 10A, § 2-5-206 19
OKLA. STAT. tit. 21, § 51.1a 20
OR. REV. STAT. ANN. § 137.707(1) 20
OR. REV. STAT. ANN. § 137.719(1) 20
OR. REV. STAT. ANN. § 161.620 20
OR. REV. STAT. ANN. § 163.150(3) 20
R.I. GEN. LAWS § 11-47-3.2(a) 20
R.I. GEN. LAWS § 14-1-7 20
S.C. CODE ANN. § 16-11-311(B) 21
S.C. CODE ANN. § 16-1-40 21
S.C. CODE ANN. § 16-3-655(A)(1) 21
S.C. CODE ANN. § 17-25-45 21
S.C. CODE ANN. § 63-19-1210 20
S.D. CODIFIED LAWS § 22-15-4 21
S.D. CODIFIED LAWS § 22-19-1 21
S.D. CODIFIED LAWS § 22-22-1 21
S.D. CODIFIED LAWS § 22-3-1 21
S.D. CODIFIED LAWS § 22-6-1 21
S.D. CODIFIED LAWS § 26-11-3.1 21

S.D. CODIFIED LAWS § 26-11-4 21
TENN. CODE ANN. § 37-1-134 (a)(1) 21
TENN. CODE ANN. § 40-35-120(g) 21
TEX. GOV'T CODE § 508.145(b) 23, 34
TEX. PENAL CODE § 12.31 ..... 23, 34
UTAH CODE ANN. § 76-2-301 21
UTAH CODE ANN. § 76-3-406 21
UTAH CODE ANN. § 76-5-302(3) 21
UTAH CODE ANN. § 76-5-405(2) 21
UTAH CODE ANN. § 78A-6-602(3) 21
UTAH CODE ANN. § 78A-6-703 21
VA. CODE ANN. § 16.1-269.1 21
VA. CODE ANN. § 53.1-151(B1) 21
VT. STAT. ANN. tit. 13, § 2303 12
VT. STAT. ANN. tit. 33, § 5204 12
W. VA. CODE § 49-5-10 22
W. VA. CODE § 61-2-14a(a) 22
WASH. REV. CODE § 13.40.110 22
WASH. REV. CODE § 9.94A.570 22
WASH. REV. CODE. § 9A.04.050 22
WIS. STAT. § 938.18 22
WIS. STAT. § 938.183 22
WIS. STAT. § 939.62(2m)(c) 22
WIS. STAT. § 973.014 22

WYO. STAT. ANN. § 14-6-237 22

WYO. STAT. ANN. § 6-2-306(d) 22

YOUTH ACCOUNTABILITY ACT (H.B. 1414) 34

Other Authorities

Amnesty International / Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 29, 31

Ashley Nellis & Ryan S. King, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA (The Sentencing Project) 28

B. Steiner & C. Hemmens, *Juvenile waiver 2003: Where are we now?*, 54(2) JUVENILE AND FAMILY COURT JOURNAL 1-24 26

Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J. L. & FAM. STUD. 11 (2007) ..... passim

Bishop, *Injustice and irrationality in contemporary youth policy*, 3 CRIMINOLOGY & PUBLIC POLICY 633-44 35

Charles D. Stimson & Andrew M. Grossman, ADULT TIME FOR ADULT CRIMES: LIFE WITHOUT PAROLE FOR JUVENILE KILLERS AND VIOLENT TEENS 31, 32, 33

David S. Tannenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of*

Immaculate Construction, *in* A CENTURY OF JUVENILE JUSTICE 30

DIVISION FOR POLICY ANALYSIS AND PUBLIC AFFAIRS, UNITED NATIONS OFFICE ON DRUGS AND CRIME, SEVENTH UNITED NATIONS SURVEY OF CRIME TRENDS AND OPERATIONS OF CRIMINAL JUSTICE SYSTEMS 31

ELLEN RYERSON, THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT 30

Howard Snyder, *Juvenile Arrests 2006*, JUVENILE JUSTICE BULLETIN 32

JOHN SUTTON, STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES 30

Melissa Sickmund *et al.*, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1997 UPDATE ON VIOLENCE 29 27

Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838 (2006) 28

Patricia Torbet *et al.*, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME (U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention) ..... passim

REPORT ON STUDY OF YOUTHFUL OFFENDERS (North Carolina Sentencing and Policy Advisory Comm'n) 34

Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUVENILE JUSTICE BULLETIN 25, 26, 27, 35

THOMAS J. BERNARD, THE CYCLE OF JUVENILE VIOLENCE 32

Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681 (1998) ..... passim

WORLD HEALTH ORGANIZATION, WORLD REPORT ON VIOLENCE AND HEALTH 31

INTEREST OF STATE *AMICI*

Juvenile violence in the United States has increased dramatically over the past half-century. The State *amici* have, and have always had, primary responsibility for meeting this daunting problem. As the United States Department of Justice observed over a decade ago:

> States are well along in developing innovative approaches to the vexing problem of juvenile violence while still maintaining, for the majority of juvenile law violators, a system of juvenile justice that preserves the hopeful aspects of a system premised on the malleability of youth.[1]

But States also have the regrettable duty of punishing, remedying, and preventing the terrible crimes that some juveniles commit. Such crimes are presented in these cases: the beating and brutal rape of a 72-year-old woman by the 13-year-old Sullivan, and the violent armed robberies perpetrated by the 16-year-old Graham.[2]

Ninety percent of the States have retained life-without-parole as an available sentence for certain violent juvenile offenders. Thankfully, only rare cases warrant that severe sanction, and the States

---

[1] Patricia Torbet *et al.*, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME iii (U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention) (July 1996) ("O.J.J.D.P. REPORT").

[2] *See* Brief of Respondent at 4-5, *Sullivan v. Florida*, No. 08-7621 (U.S. Jul. 16, 2009); Brief of Respondent at 6-9, *Graham v. Florida*, No. 08-7412 (U.S. Jul. 16, 2009).

themselves vary on when it may be imposed on juveniles. The State *amici* have an overarching interest in retaining the discretion to calibrate juvenile sentences. Only if left free to do that can the States continue to respond to the evolving challenge of juvenile violence.

SUMMARY OF ARGUMENT

No one wants to believe that young people can commit horrible crimes. But sometimes they do. And no one wants to consider whether they should serve lengthy prison terms. But States must consider it, since they are responsible to their own citizens for protecting them, for deterring crime, for assuaging the victims, and for punishing the guilty. Consequently, as Part I explains, the Eighth Amendment leaves States considerable latitude in deciding how to sentence violent juvenile offenders.

It is a rare and agonizing decision to sentence a juvenile to life-without-parole. But rare does not mean unconstitutional. Rather, rarity is an index of mercy—of reluctance to take this severe step. And yet, as Part II describes, States have overwhelmingly made the reasoned legislative choice that certain crimes—such as rape, robbery and kidnapping—are so morally reprehensible, so damaging to victims, and so undermine a community's sense of security, that the law's second-most severe sentence should be available, even if the offender is a juvenile. The District of Columbia and the federal government have done so as well. And even the few States that expressly disallow juvenile life-without-parole sentences

would nonetheless permit lengthy mandatory sentences of up to 50 years.

Finally, as Part III explains, politically-accountable state legislatures are the ones that should weigh such painful choices, and they have done so vigilantly. The best example is the kaleidoscope of state transfer and waiver provisions through which juveniles may become subject to adult penalties. Through those mechanisms, States have grappled profoundly with every facet of juvenile violence—such as an offender's age, maturity, psycho-social development, criminal background, and potential for rehabilitation. States thus expose juveniles to a possible life-without-parole sentence only in carefully considered circumstances in which deterrence and punishment outweigh rehabilitation.

Far from condemning such a choice, this Court has tacitly approved it. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court reasoned that States had deterrence options for violent juveniles other than the death penalty. The Court deemed it "worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." *Id.*, at 572. The Court should not now interpret the Eighth Amendment to remove the States' power to impose this sanction on violent juvenile criminals such as the Petitioners.

ARGUMENT

I. OUTSIDE THE DEATH-PENALTY CONTEXT, THE EIGHTH AMENDMENT STRONGLY DEFERS TO STATE SENTENCING JUDGMENT.

How severe should criminal sentences be? Should the guilty be eligible for parole? If so, when? Should sentencing aim primarily to reform, punish or deter? It is "properly within the province of legislatures, not courts" to ponder these questions. *Harmelin v. Michigan*, 501 U.S. 957, 998 (1991) (Kennedy, J., concurring) (quoting *Rummel v. Estelle*, 445 U.S. 263, 275-76 (1980)).[3] This Court "do[es] not sit as a 'superlegislature' to second-guess" the hard sentencing choices that fall to state legislatures. *Ewing v. California*, 538 U.S. 11, 29 (2003) (op. of O'Connor, J.). And squarely within their responsibilities is the agonizing subject presented in these cases: how severely to sentence violent juvenile offenders.

The Court's death-penalty cases have little to say about the issue. Life-without-parole "cannot be compared with death." *Harmelin*, 501 U.S., at 996 (op. of Court). As Justice Stewart once observed, "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North*

---

[3] *See also Solem v. Helm*, 463 U.S. 277, 290 (1983) (explaining that the Eighth Amendment affords "substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes").

Carolina, 428 U.S. 280, 305 (1976) (op. of Stewart, J.). The Court has refused to extend death-penalty analysis to life-without-parole sentences.[4] Cases such as *Roper*, *supra*, then, provide marginal assistance in gauging juvenile prison terms, "[b]ecause a sentence of death differs in kind from *any* sentence of imprisonment, *no matter how long*." *Rummel*, 445 U.S., at 272 (emphasis added).[5]

Every State carefully considers juveniles' age, maturity, and background before trying them as adults. *See infra* Part II.A. But the Eighth Amendment does not directly regulate state discretion over such matters. *See, e.g., Harmelin*, 501 U.S., at 994-95 (op. of Court) (holding that Eighth Amendment does not require consideration of mitigating factors in non-capital sentencing). At most, juvenile non-capital sentences must satisfy a narrow proportionality principle that "forbids only extreme sentences ... 'grossly disproportionate' to the crime." *Harmelin*, 501 U.S., at 997, 1001 (Kennedy, J., concurring) (and collecting cases); *see*

---

[4] *See Harmelin*, 501 U.S., at 996 (op. of Court) (rejecting argument that, simply because life-without-parole is "the second most severe known to the law," it should be constitutionally equated with death); *Roper*, 543 U.S., at 568 (explaining that "[b]ecause the death penalty is the most severe punishment, the Eighth Amendment applies to it *with special force*") (emphasis added).

[5] *See also Solem*, 463 U.S., at 295 (explaining "the death penalty is different from other punishments in kind rather than degree"); *Rummel*, 445 U.S., at 272 (observing that "[t]his theme, the unique nature of the death penalty for purposes of Eighth Amendment analysis, has been repeated time and time again in our opinions") (collecting cases).

also Ewing, 538 U.S., at 21 (op. of O'Connor, J.). Such review is ill-adapted for drawing lines at particular sentence lengths, ages, or stages of psycho-social development.[6]

Gross proportionality implicitly allows the different States to adopt a variety of approaches to juvenile sentencing. Comparing juvenile sentences across state lines may provide some limited analytical guidance[7]—here, for instance, it underscores the widespread availability of life-without-parole for violent juvenile crime, and hence the relative *proportionality* of the sentence. *See infra* Part II.A. But even if one State imposes,

---

[6] *See, e.g., Harmelin*, 501 U.S., at 1000-01 (Kennedy, J., concurring) (reasoning that the Court's "decisions recognize that [it] lack[s] clear objective standards to distinguish between sentences for different terms of years"); *see also Rummel*, 445 U.S., at 1139-40 (observing that the relatively "bright lines" between different *types* of punishments are "considerably clearer than would be any constitutional distinction between one term of years and a shorter or longer term of years"); *see also Harris v. Wright*, 93 F.3d 581, 584 (9th Cir. 1996) (explaining that "capital punishment aside, there's no constitutional (or rational) basis for classifying punishment in distinct, ordinal categories").

[7] *See, e.g., Harmelin*, 501 U.S., at 1005 (Kennedy J., concurring) (noting that inter- and intra-state comparisons are "appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality"); *see also id.*, at 999-1000 (explaining that "[s]tate sentencing schemes may embody different penological assumptions, making interstate comparison of sentences a difficult and imperfect enterprise"); *Ewing*, 538 U.S., at 23 (op. of O'Connor, J.) (agreeing that proportionality "d[oes] not mandate comparative analysis") (quotations omitted).

nationally, the most stringent juvenile sentences, that alone does not render them grossly disproportionate for Eighth Amendment purposes.[8]

This restrained review affords States wide latitude in deciding how severely to punish violent juvenile crime in particular. The Court has emphasized that, for Eighth Amendment purposes, "nonviolent crimes are less serious than crimes marked by violence or the threat of violence." *Solem*, 463 U.S., at 292-93.[9] Thus States may decide that direct violent assaults against persons—even by juveniles—merit especially severe penalties.[10] And offenses may be deemed serious even if they are merely related to other violent crime.[11] In sum, States may "with reason conclude that the threat posed to the individual and society by" violent

---

[8] *See, e.g., Rummel*, 445 U.S., at 281 (explaining that "[e]ven were we to assume that the statute employed against Rummel was the most stringent found in the 50 States, that severity hardly would render Rummel's punishment 'grossly disproportionate' to his offenses or to the punishment he would have received in the other States").

[9] *See also Harmelin*, 501 U.S., at 1002 (Kennedy, J., concurring) (quoting *Solem*, 463 U.S., at 296) (reasoning that issuing a bad check—"one of the most passive felonies a person could commit"—is relatively non-serious, given it "involve[s] neither violence nor threat of violence").

[10] *See, e.g., Solem*, 463 U.S., at 297 (observing that prior three-strike felonies "were nonviolent and none was a crime against a person").

[11] *See, e.g., Harmelin*, 501 U.S., at 1002-03 (Kennedy, J., concurring) (deeming cocaine possession violent for Eighth Amendment purposes given a "direct nexus between illegal drugs and crimes of violence").

crimes "is momentous enough to warrant the deterrence and retribution of a life sentence without parole." *Harmelin*, 501 U.S., at 1003 (Kennedy, J., concurring).

When States calibrate juvenile sentences they make "a normative judgment about deserved punishment [that] rests on a moral foundation, not a scientific one." Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J. L. & FAM. STUD. 11, 72 (2007) ("Feld"). It is thus a task lying at the core of politically-accountable state sovereignty. This Court has a "longstanding [...] tradition of deferring to state legislatures in making and implementing such important policy decisions." *Ewing*, 538 U.S., at 24 (op. of O'Connor, J.) (collecting cases).

II. IN THE VAST MAJORITY OF STATES, VIOLENT JUVENILES MAY BE TRIED AS ADULTS AND SENTENCED TO LIFE-WITHOUT-PAROLE.

The sentencing landscape over the last half-century shows that a super-majority of States have decided that life-without-parole should remain available for violent juvenile criminals. Such sentences are rare, of course, and should be. But 90% of the States have deliberately retained this severe measure for dealing with juvenile violence.

Petitioners in both cases have framed their arguments solely in terms of *Roper*'s death-penalty

analysis.[12] But, as Part I *supra* explains, that is the wrong test for non-capital juvenile sentences. In that context, the Eighth Amendment "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin*, 501 U.S., at 1001 (Kennedy, J., concurring) (quoting *Solem*, 463 U.S., at 288). Consequently, the following survey of sentencing policies and trends will serve double duty.

First, it will demonstrate that, even under the stricter standards Petitioners have incorrectly adopted, there is no "objective indicia of consensus" that life-without-parole is disproportionate for violent juvenile offenders. *See Roper*, 543 U.S., at 564. To the contrary, any objective measure based on legislative enactments points overwhelmingly in the opposite direction. Second, and more to the point, the data will demonstrate that such sentences are not grossly disproportionate to violent crimes committed by juveniles generally—and certainly not to the beating and brutal rape of a 72-year-old woman perpetrated by Sullivan, nor to the violent armed robberies perpetrated by Graham.[13] In sum, States have a "reasonable basis for believing" that life-without-parole for violent juvenile crime "'advance[s] the goals of [their] criminal justice systems in [a] substantial way.'" *Ewing*, 538 U.S.,

---

[12] *See* Brief for Petitioner at 25-27, *Graham v. Florida*, No. 08-7412 (U.S. Jul. 16, 2009); Brief for Petitioner at 8, *Sullivan v. Florida*, No. 08-7621 (U.S. Jul. 16, 2009).

[13] *See* Brief of Respondent at 4-5, *Sullivan v. Florida*, No. 08-7621 (U.S. Jul. 16, 2009); Brief of Respondent at 6-9, *Graham v. Florida*, No. 08-7412 (U.S. Jul. 16, 2009).

at 28 (op. of O'Connor, J.) (quoting *Solem*, 463 U.S., at 297 n.22).

A. Legislation in Forty-Five States Allows Life-Without-Parole for Violent Juvenile Offenders.

The raw data from legislative enactments demonstrate an overwhelming judgment that life-without-parole is appropriate for certain juveniles who commit violent crimes. Overall, **forty-five** States have decided that juvenile offenders may be tried as adults and sentenced to life-without-parole. While they understandably do not highlight the point in their briefs, the Petitioners in both *Graham* and *Sullivan* broadly accept—if somewhat understate—these figures. *See* Brief for Petitioner at App'x C, *Graham v. Florida*, No. 08-7412 (U.S. Jul. 16, 2009); Brief for Petitioner at 49-50, *Sullivan v. Florida*, No. 08-7621 (U.S. Jul. 16, 2009). The State data break down as follows.

(1). Seven States allow the sentence for homicide crimes only.

The following six States allow life-without-parole sentences for juveniles convicted of homicide crimes only:

(1). **Connecticut** mandates automatic transfer of juveniles to adult court at age 14 for a capital felony, Class A or B felony or arson murder, CONN. GEN. STAT. ANN. § 46b-127 (2009), exposing them to a possible life-without-parole sentence for a capital felony, *id.* § 53A-35A (2008).

(2). **Hawaii** allows judicial waiver of a minor at any age for murder and attempted murder in the first and second degrees, HAW. REV. STAT. ANN. § 571-22(d) (2006), mandating a life-without-parole sentence upon conviction of murder or attempted murder in the first degree, *id.* § 706-656(1) (1993).[14]

(3). **Maine** mandates a bind-over hearing for juveniles at any age, ME. REV. STAT. ANN. tit. 15 § 3101(4) (2003), exposing them to a potential life-without-parole sentence for murder, *id.* tit. 17-a § 1251 (2006).

(4). **Massachusetts** automatically excludes from juvenile jurisdiction a 14-year-old charged with first degree murder, MASS. GEN. LAWS ANN. ch. 119 § 74 (2008), opening up a possible life-without-parole sentence, *id.* ch. 265 § 2 (2008).

(5). **New Jersey** mandates transfer for certain juveniles 14 or older, N.J. STAT. ANN. § 2A:4A-26 (2009), permitting a life-without-parole sentence, *id.* § 2C:11-3(b)(5) (2009), for murder where the victim is a law enforcement officer, *id.* § 2C:11-3(b)(2) (2009), or where

---

[14] A minor convicted of murder or attempted murder in the second degree receives a mandatory sentence of life imprisonment with the possibility of parole. But a second-degree murder sentence may be enhanced to life-without-parole if "the murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity," or if the minor was previously convicted of first or second degree murder in Hawaii or an equivalent crime in another State. *Id.* §§ 706-656(2); 706-657 (Supp. 2008).

the victim was under age 14 and was sexually assaulted, *id.* § 2C:11-3(b)(3) (2009).

(6). **New Mexico** defines a "serious youthful offender" as "an individual fifteen to eighteen years of age who is charged with and indicted or bound over for trial for first degree murder," N.M. STAT. § 31-18-15.2(A) (1996), thus allowing a life-without-parole sentence, *see id.* § 31-18-14 (2009) (amended by 2009 N.M. Laws, ch. 11, Sec. 1) (abolishing death penalty but providing that "the defendant shall be sentenced to life imprisonment or life imprisonment without possibility of release or parole").[15]

(7). **Vermont** allows judicial transfer even from ages 10 to 13, VT. STAT. ANN. tit. 33, § 5204 (2007), thus exposing juveniles to a potential life-without-parole sentence for first or second degree murder, *id.* tit. 13, § 2303 (2005).

---

[15] The previous version of N.M STAT. § 31-18-14 provided "if the defendant has not reached the age of majority at the time of the commission of the capital felony for which he was convicted, he may be sentenced to life imprisonment but shall not be punished by death." The recently amended 31-18-14 no longer distinguishes between minors and adults, but specifically retains a possible life-without-parole sentence for both. *See also id.* § 31-18-15.3(D) (1993) (providing "court *may* sentence the [serious youthful] offender to less than, but not exceeding, the mandatory term for an adult," if guilty of first degree murder) (emphasis added).

(2). Thirty-eight States also allow the sentence for non-homicide crimes.

The following thirty-nine States additionally[16] provide that juveniles may be sentenced to life-without-parole for non-homicide violent crimes, such as sexual assault, burglary, armed robbery, and kidnapping:

(1). **Alabama** allows transfer to adult court of a juvenile from age 14, ALA. CODE § 12-15-203 (2009), thus permitting a life-without-parole sentence for felony offenses, including burglary and rape, *id.* §§ 13A-5-9(c)(3), (4) (2000); 13A-7-5 (2006); 13A-6-61 (2000).

(2). **Arizona** allows, and sometimes mandates, adult prosecution of juveniles age 14 and older, ARIZ. REV. STAT. § 13-501 (2009), thus exposing them to a potentially mandatory natural life sentence for certain violent sexual assaults, *see id.* § 13-1423 (2009).

(3). **Arkansas** allows juvenile transfer from age 14, ARK. CODE ANN. § 9-27-318 (2003), and so permits a life-without-parole sentence for multiple crimes including kidnapping, rape

---

[16] Juvenile transferees in these States are also eligible (unless otherwise noted) for life-without-parole for homicide crimes to the same extent as adults. For instance, in addition to the non-homicide crimes discussed *infra*, Delaware requires adult prosecution of juveniles for murder, DEL. CODE ANN. tit. 10, §§ 1010(a)(1); 921(2)(a) (2008), thus requiring a sentence of life-without parole for first degree murder, *id.* tit. 11, §§ 636; 4209(a) (2008), and permitting that sentence for second degree murder, *id.* tit. 11 §§ 635; 4205(b) & (j) (2008).

and aggravated robbery, *id.* § 5-4-501(c)(1)(b), (c)(2) (2009).

(4). **California** allows adult prosecution of persons under age 18, CAL. PENAL CODE § 1170.17 (2004), thus permitting life-without-parole upon multiple convictions of various non-homicide sexual assault and robbery crimes, *id.* §§ 667.7(a), (b) (2007).

(5). **Delaware** requires adult prosecution of juveniles for various crimes, including attempted murder, rape, assault, kidnapping and robbery, DEL. CODE ANN. tit. 10, §§ 1010(a)(1); 921(2)(a) (2008), thus allowing life-without-parole for attempted murder or rape, *id.* tit. 11 §§ 636; 531; 773; 4205(b) & (j) (2008).

(6). **Florida** makes juveniles of any age subject to indictment for crimes punishable by death penalty or life imprisonment, FLA. STAT. ANN. § 985.56 (2007), and thus makes life-without-parole available for certain sexual batteries, *id.* § 794.011(3) (2002), and certain burglaries, *id.* § 810.02(2) (2007).

(7). **Georgia** allows transfer for juveniles age 13 and 14 for aggravated battery and life imprisonment crimes, GA. CODE ANN. § 15-11.30.2(4) (2000), thus allowing life-without-parole for rape, *id.* § 16-6-1(b) (2006), and mandating it upon second conviction for various "serious violent felonies," including armed robbery, kidnapping, rape, and aggravated sexual battery, *id.* § 17-10-7(b)(2) (1994).

(8). **Idaho** provides discretionary transfer for juveniles of any age for crimes including murder, robbery, rape, and assault, IDAHO CODE §§ 20-508; 20-509 (2007), thereby making available life sentences for robbery and rape, *id.* §§ 18-6503, 18-6104 (2009).

(9). **Illinois** allows juvenile transfer at age 13 and mandates it at age 15, 705 ILL. COMP. STAT. 405/5-805(1)-(3) (2007), thus exposing juveniles to a possible natural life for certain sexual assaults, 730 ILL. COMP. STAT. 5/5-8-1(a)(2.5), (d)(4) (2009).

(10). **Indiana** requires transfer of "child" for felony prosecution, IND. CODE § 31-30-3-6(1) (2008), and thus makes available life-without-parole upon multiple convictions for various crimes, including sexual battery, robbery, and burglary (if each committed with a deadly weapon), *id.* § 35-50-2-8.5(a) (2009).

(11). **Iowa** allows transfer of juveniles age 14 and older, IOWA CODE § 232.45(6), permitting natural life imprisonment for Class A felonies, including kidnapping and sexual abuse, *id.* §§ 902.1 (2003); 710.2 (2009), 709.2 (2003).

(12). **Louisiana** allows adult prosecution of juveniles age 14 and older, LA. CHILD. CODE art. 305 (2004); art. 857(A) (2004), thus permitting life-without-parole sentences for *15* year olds convicted of aggravated rape and aggravated kidnapping, LA. REV. STAT. ANN. §§ 14:42(D)(1) (2007); 14:44 (2007); *see* LA.

CHILD. CODE art. 857(B) (2004) (14-year-old transferee may only be imprisoned to age 31).

(13). **Maryland** provides discretionary transfer for a juvenile of any age for crimes punishable by death or life imprisonment, MD. CODE ANN., CTS. & JUD. PROC. §§ 3-8A-06(a)(2) (2001); 3-8A-03(d)(1) (2001), and thus makes a juvenile subject to life-without-parole for first degree rape, MD. CODE ANN., CRIM. LAW § 3-303(d)(2) (2009).

(14). **Michigan** allows waiver for felonies committed by juveniles 14 and over, MICH. COMP. LAWS §§ 712A.4 (2002)); 769.1 (1) (2000); 764.27 (2000), and thus permits life-without-parole sentences for kidnapping, *id.* § 750.349(3) (2007), armed robbery, *id.* § 750.529 (2004), carjacking, *id.* § 750.529a(1) (2004), and recidivist controlled substances offenses, *id.* § 333.7413(1) (2001).

(15). **Minnesota** provides discretionary transfer for juveniles 14 or older, MINN. STAT. § 260B.125(1) (2007), allowing mandatory life-without-parole for certain sex offenses, *id.* §§ 609.055 (2009); 609.3455(2) (2009).

(16). **Mississippi** allows transfer for juveniles 13 or older, MISS. CODE ANN. § 43-21-157 (2009), thus exposing them to potential mandatory life-without-parole sentences for recidivist violent offenses, including sex crimes and robbery, *id.* §§ 47-7-3(1)(a) (2009); 99-19-81 (1977); 99-18-83 (1977).

(17). **Missouri** has discretionary transfer for juveniles 12 or older, MO. REV. STAT. § 211.071(1) (2009), and so allows a mandatory life-without-parole sentence for persistent sexual offenders, *id.* § 558.018 (2009), and for some drug offenses, *id.* §§ 195.222 (2004); 195.223 (2004), and for persistent drug offenders, *id.* §§ 195.214 (2004); 195.218 (2004).

(18). **Montana** allows transfer from age 12 for certain felonies (from age 16 for others), MONT. CODE ANN. § 41-5-206(1)(a), (b) (2007), thus allowing a life-without-parole sentence, *id.* §§ 41-5-2503(1)(a) (1999); 46-18-202(2) (2007), for crimes such as aggravated kidnapping, *id.* § 45-5-303 (1995), non-consensual sexual intercourse, *id.* § 45-5-503 (2007), and aggravated assault while in official detention, *id.* § 46-18-220 (2001).[17]

(19). **Nebraska** allows discretionary prosecution for juveniles under age 16, NEB. REV. STAT. §§ 43-247 (2008); 43-276 (2008), thereby authorizing a life-without-parole sentence, *id.* §§ 29-2204 (2002); 28-105 (2002), for all class IA, and IB felonies, including first and second degree murder, kidnapping and sexual assault of a child, *id.* §§ 28-303 (2008); 28-304 (2008); 28-313(2) (1977); 28-319.01 (2009).

---

[17] Montana permits, but does not mandate, juvenile life-without-parole for homicide. *See id.* §§ 46-18-219(1)(a)(i) (2001); 46-18-222(1) (2007).

(20). **Nevada** excludes from juvenile jurisdiction certain sexual assault and firearm crimes at age 16 for previously-adjudicated delinquents, certain felonies on school property resulting in death or great bodily harm for any age, and other recidivist crimes for any age, NEV. REV. STAT. § 62B.330(b)-(e) (2004),[18] thus permitting life-without-parole sentences for, *inter alia*, certain sexual assaults, *id.* § 200.366(2)-(4), battery with the intent to commit sexual assault, *id.* § 200.400(4), and habitual criminal offenses, *id.* §§ 207.010(1)(b)(1); 207.012(1)(b)(1).

(21). **New York** provides generally that "a person less than sixteen years old is not criminally responsible for conduct," N.Y. PENAL LAW § 30.00(1) (2008), thus allowing a mandatory life-without-parole sentence for a sixteen-year-old convicted of terrorism crimes involving a class A-I felony such as first-degree kidnapping, *id.* §§ 490.25(d) (2008); 135.25 (2009).[19]

---

[18] Additionally, a juvenile court has discretion to certify as an adult a juvenile age 14 or older charged with an offense punishable as a felony, and is required to certify a juvenile age 14 or older charged with certain violent sexual assault or firearm crimes. *Id.* §§ 62B.390(1), (2) (2004).

[19] *See also id.* § 70.00(5) (2009) (allowing life-without-parole sentence for sixteen-year-old convicted of second-degree murder); *cf. id.* § 30.00(2) (2009) (allowing 13-, 14-, or 15- year old to be found criminally responsible for second degree murder); § 70.05(2)(a) (2009) (mandating maximum term of life imprisonment for juvenile offender convicted of second degree murder).

(22). **New Hampshire** allows juvenile transfer from age 13, N.H. REV. STAT. ANN. §§ 628:1(II) (2004); 169-B:24(II) (2004), and thus permits life-without-parole for multiple convictions of sexual assault, *id.* § 651.6(III)(e) (2009).

(23). **North Carolina** provides that a juvenile 13 or older may be sentenced to life-without-parole for violent habitual offenses, N.C. GEN. STAT. § 14-7.12 (2007), for a second conviction of first degree rape or sexual assault, *id.* § 15A-1340.16B(a) (2007), or for committing a Class B1 felony while wearing or possessing a bullet proof vest, *id.* § 15A-1340.16C (2007). *See* N.C. GEN. STAT. § 7B-2200 (2007).

(24). **North Dakota** requires adult prosecution of juveniles 14 and older for certain crimes, N.D. CENT. CODE §§ 27-20-34 (2007); 12.1-04-01 (1981), permitting life-without-parole for gross sexual imposition, *id.* §§ 12.1-20-03 (2009); 12.1-32-01(1) (1997).

(25). **Ohio** makes juveniles 14 or older eligible for discretionary transfer, OHIO REV. CODE ANN. § 2152.10(B) (2002), allowing them to be sentenced to life-without parole for rape under certain circumstances, *id.* §§ 2152.12 (2000); 2907.02 (2007), 2971.03 (2007).

(26). **Oklahoma** allows juveniles ages 14 or older to be prosecuted and sentenced as adults, OKLA. STAT. tit. 10A, §§ 2-5-204; 2-5-206 (2009), thus permitting mandatory life-

without-parole on second offense of forcible sodomy and rape, *id.* tit. 21, § 51.1a (2009).

(27). **Oregon** does not allow life-without-parole for juveniles transferred to adult court, *see* OR. REV. STAT. ANN. § 161.620 (2009), but would allow the sentence for 15- to 17-year-old juveniles direct-charged, *id.* § 137.707(1) (2009), for crimes such as aggravated murder and third-strike Class A felony sex crimes, *id.* §§ 163.150(3) (2009); 137.719(1) (2003).

(28). **Pennsylvania** allows, and in many cases requires, adult transfer of juveniles ages 14 and over, 42 PA. CONS. STAT. §§ 6355(a) (2000); 6302 (2000), allowing life-without-parole sentences for third-offense violent crimes and for certain rapes, *id.* § 9714(2) (2007); 18 PA. CONS. STAT. § 3121(e)(2) (2000); 61 PA. CONS. STAT. § 331.21(a) (1999).

(29). **Rhode Island** allows a juvenile of any age to be tried as an adult for crimes punishable by life, R.I. GEN. LAWS § 14-1-7 (1990), making a life-without-parole sentence available for a third-offense crime of violence involving a firearm, *id.* § 11-47-3.2(a) (2000).

(30). **South Carolina** allows juveniles 14 or older to be tried as adults for serious felonies, S.C. CODE ANN. § 63-19-1210 (2008), exposing them to life-without-parole sentences for committing, or aiding in committing, first-degree burglary, criminal sexual battery on minors under 11, and second conviction of crimes including robbery, burglary, kidnapping and criminal sexual conduct, *id.*

§§ 16-1-40 (2003); 16-11-311(B) (1995); 16-3-655(A)(1) (2008), 17-25-45 (2009).

(31). **South Dakota** allows adult transfer of felony-charged juveniles 10 and older (requiring it at age 16), S.D. CODIFIED LAWS §§ 26-11-4 (1997); 26-11-3.1 (2006); 22-3-1 (2005), thus permitting life-without-parole for all Class A, B and C felonies, including kidnapping and rape, *id.* §§ 22-22-1 (2005); 22-19-1 (2005); 22-6-1 (2005); 22-15-4 (2004).

(32). **Tennessee** allows adult transfer of any juvenile for serious crimes, TENN. CODE ANN. § 37-1-134 (a)(1) (2006), thus mandating life-without-parole sentences for repeat violent offenses including rape and aggravated burglary, *id.* § 40-35-120(g) (1995);

(33). **Utah** allows certification to adult court of juveniles 14 and older charged with felonies, UTAH CODE ANN. § 78A-6-703 (2008); 78A-6-602(3) (2008); 76-2-301 (1973), permitting a life-without-parole sentence for crimes including aggravated kidnapping and sexual assault, *id.* §§ 76-3-406 (2009); 76-5-302(3) (2007); 76-5-405(2) (2009).

(34). **Virginia** allows adult transfer for juveniles 14 or older charged with felonies, VA. CODE ANN. § 16.1-269.1 (1997), making them eligible for life-without-parole for third offense of crimes such as rape and armed robbery, *id.* § 53.1-151(B1) (1993).

(35). **Washington** allows adult transfer of juveniles 8 or older, WASH. REV. CODE §§

13.40.110 (2009); 9A.04.050 (1975), exposing them to life-without-parole sentences for multiple convictions of class A felonies, *id.* §§ 9.94A.570 (2000); 9.94A.505 (2009).

(36). **West Virginia** mandates for certain serious offences adult transfer of juveniles 14 and older, and allows transfer of juveniles of any age, W. VA. CODE § 49-5-10(b)-(e) (2001), allowing a life-without-parole sentence for kidnapping, *id.* § 61-2-14a(a) (1999).

(37). **Wisconsin** generally allows transfer of juveniles age 14 and older, while mandating transfer of any juveniles for certain crimes, WIS. STAT. §§ 938.18 (2009); 938.183 (2009), and thus permits a life-without-parole sentence for "persistent repeat" felony offenses, *id.* §§ 939.62(2m)(c) (2005); 973.014 (1998).

(38). **Wyoming** allows transfer of juveniles 13 and older, WYO. STAT. ANN. § 14-6-237 (2004), permitting life-without-parole sentences for recidivist sex offenders, *id.* § 6-2-306(d) (2007).

(3). Only four States specifically disallow life-without-parole, while still allowing lengthy mandatory terms.

Only four States—Colorado, Kansas, Kentucky, and Texas—specifically disallow juvenile life-

without-parole sentences for any crime.[20] Even so, these States would allow juveniles to be sentenced to mandatory prison terms of up to 50 years before parole eligibility. *See, e.g.*, TEX. PENAL CODE § 12.31 (2009); TEX. GOV'T CODE § 508.145(b) (2009) (imposing mandatory life on juveniles convicted of capital felony, with parole available only after serving "40 calendar years"); COLO. REV. STAT. ANN. § 18-1.3-401(4)(b)(I) (2009) (same for class 1 felonies); KAN. STAT. ANN. 21-4635(b) (2004) (allowing mandatory sentence of 50 years for first degree murder upon finding of aggravating factors).

---

[20](1). **Colorado**, COLO. REV. STAT. ANN. § 18-1.3-401(4)(b) (2009) (changing law in 2006 to mandatory life sentence with possibility of parole after 40 years).

(2). **Kansas**, KAN. STAT. ANN. § 21-4622 (2004) (removing sentence in 2004).

(3). **Kentucky**, KY. REV. STAT. ANN. § 640.040(1) (1998); *Shepherd v. Commonwealth*, 251 S.W.3d 309, 320-21 (Ky. 2008) (interpreting § 640.040(1) to allow only life-without-parole for 25 years for Class A felony).

(4). **Texas**, TEX. PENAL CODE § 12.31 (2009) (amended effective September 1, 2009, to remove possibility of life-without-parole for capital felony); *see also* 2009 TEX. SESS. LAW SERV. Ch. 765 (S.B. 839) (Sept. 1, 2009).

Alaska makes parole available for any crime, whether committed by adults or juveniles. *See* ALASKA STAT. § 12-55-015(g) (2009) (providing for mandatory parole eligibility).

(4). Both the District of Columbia and the federal government allow juvenile life-without-parole for non-homicide crimes.

The judgment of the vast majority of States to allow life-without-parole sentences for violent juvenile crime is reinforced by the District of Columbia and the federal government, both of which allow such sentences for homicide and violent non-homicide crimes. The District of Columbia allows filing of a delinquency petition without reference to a juvenile's age. *See* D.C. CODE ANN. § 16-2305 (2005). While a juvenile convicted in the District of first degree murder may not receive life-without-parole, *id.* § 22-2104 (2001), juveniles are nonetheless eligible for life-without-parole sentences for the murder of a law-enforcement officer, *id.* § 22-2106 (2002), for terroristic first-degree murder, *id.* § 22-3153(a) (2002), for aggravated first-degree sexual abuse, *id.* § 22-3020(a) (2001), and for recidivist crimes of violence, *id.* § 22-1804a(a)(2) (2001).

The United States allows adult prosecution of juveniles age 15 or older for crimes of violence and certain controlled substance and firearm offenses. 18 U.S.C. § 5032 (1996). Adult prosecution is authorized for 13-year-olds for specified crimes within federal maritime or territorial jurisdiction, including murder, manslaughter, certain aggravated sexual abuse offenses, armed robbery, and assault. *See id.* (citing 18 U.S.C §§ 113(a)-(c); 1111; 1113; 2111; 2113; 2241(a), (c)). These transfer provisions expose juveniles as young as 13 years old to mandatory life-without-parole sentences for

multiple violent felony convictions. *See* 18 U.S.C. § 3559(c)(1), (c)(2)(F) (2006).[21] [22]

B. Evolving Transfer Provisions Show that States Have Consciously Toughened Juvenile Sentencing.

Illuminating the raw data from state legislation are the statutory mechanics making juveniles eligible for life-without-parole. Juvenile offenders may be tried as adults generally through three "transfer" or "waiver" mechanisms: judicial waiver, legislative offense exclusion, and prosecutorial direct-file. *See generally* Feld, *supra*, at 38-39 (discussing mechanisms); Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUVENILE JUSTICE BULLETIN, Aug. 2008, at 1-2 ("Redding") (same); *see also* Parts II.A.1 & II.A.2, *supra* (detailing state transfer laws).

---

[21] Additionally, 17-year-olds may enlist in the United States Military, *see* 10 U.S.C. § 505(a) (2008), and are thus eligible for life-without-parole, *id.* § 856a (2000), for crimes including murder, child rape, and other crimes for which a court-martial may impose a life sentence, *id.* §§ 918 (2000); 920 (2007); *see also United States v. Christian*, 63 M.J. 205 (2006) (generally discussing life-without-parole sentences under military law).

[22] A bill pending before a House subcommittee, the "Juvenile Justice Accountability and Improvement Act of 2009," would require the United States to provide juvenile offenders periodic opportunities for parole or supervised release "not less than once during the first 15 years of incarceration, and not less than once every 3 years thereafter." H.R. 2289, 111th Cong. § 5 (considered as such by House subcommittee, June 9, 2009). The bill would also withhold certain federal funds from any States that did not establish such a parole system. *Id.* § 3.

Through such provisions, States make a conscious election respecting juvenile punishment: "[w]aiver of juvenile court jurisdiction presents the *stark choice* between treating a youth in the juvenile system and punishing him in the criminal justice system." Feld, *supra*, at 38 (emphasis added).[23] The evolution of state transfer mechanisms over the past several decades evidences an unmistakable "nationwide policy shift toward transferring juvenile offenders to the criminal court." Redding, *supra*, at 2.[24]

"The evolution in youth violence and homicide rates in the late 1980s and early 1990s caused almost every state to revise its laws to transfer more juveniles in criminal court." Feld, *supra*, at 40. Scholars in this area report that, from 1979 to 2003, the number of States requiring *automatic* transfer from juvenile to adult court rose from 14 to 31. *See* Redding, *supra*, at 1 (citing B. Steiner & C. Hemmens, *Juvenile waiver 2003: Where are we now?*, 54(2) JUVENILE AND FAMILY COURT JOURNAL 1-24 (Spring 2003)). Another scholar observes that "[i]n a three-year period, between 1992 and 1995,

---

[23] *See also, e.g., State v. Rauch*, 13 P.3d 324, 333 (Haw. 2000) (reasoning that juvenile transfer provisions "clearly evince[] a legislative policy" regarding the relative severity of juvenile crime).

[24] *See also* Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 688 (1998) ("Logan") (explaining that "[w]ith these changes [*i.e.* to state transfer laws] has come a dramatic expansion in the scope and number of juvenile offenders eligible, or indeed required, to be prosecuted in adult court").

forty jurisdictions enacted or expanded provisions for juvenile waiver to adult court." Logan, *supra*, at 688 (citing Melissa Sickmund *et al.*, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1997 UPDATE ON VIOLENCE 29).[25] Symptomatic of deeper sociological and philosophical debates over juvenile punishment, *see infra* Part III, such trends show States deliberately "adopt[ing] punitive laws to transfer more and younger offenders to criminal courts and to punish them more severely." Feld, *supra*, at 34; *see also* Redding, *supra*, at 1 (observing that expansion of transfer laws was part of "legal reforms designed to get tough on juvenile crime").

These trends explain why juvenile offenders in a super-majority of States are, today, more readily subject to life-without-parole sentences. Whereas "prior to the 1970s, virtually no states imposed [life-without-parole] sentences," movement toward greater severity has altered the landscape—so dramatically, in fact, that in one scholar's reckoning:

> judges now sentence youths to [life-without-parole] three times as frequently as they did in 1990. The average age at which juveniles committed the crimes for which courts impose [life-without-parole] sentences is

---

[25] *See also* Patricia Torbet *et al.*, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 3-9 (U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention) (July 1996) ("O.J.J.D.P. REPORT") (documenting "trend" from 1992-95 that "[m]ore serious and violent juvenile offenders are being removed from the juvenile justice system in favor of criminal court prosecution").

> sixteen years, but children as young as thirteen years of age receive such sentences.

Feld, *supra*, at 69-70. This juvenile sentencing trend coincides with an overall increase in life-without-parole sentences for all offenders. *See, e.g.*, Ashley Nellis & Ryan S. King, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 4-6, 8-9 (The Sentencing Project) (July 2009) (reporting that over last quarter-century, the number of individuals serving life sentences has quadrupled, and that between 1992 and 2008 the number serving life-without-parole sentences has tripled).[26]

Death-penalty opponents have encouraged these juvenile sentencing trends by "provid[ing] bipartisan support for [life-without-parole] sentences as an alternative to capital punishment." Feld, *supra*, at 69 (citing Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838 (2006)). Life-without-parole "is seen as a sentencing compromise by both ends of the political spectrum," because it promises strong deterrence without the death penalty's political and moral baggage. Logan, *supra*, at 690 n.37. This Court has itself taken a similar view, observing in *Roper* that "the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." 543 U.S., at 572.

Finally, confirmation of these sentencing trends comes also from opponents of juvenile life-without-

---

[26] Report available at http://www.sentencingproject.org/doc/publications /inc_nocxit.pdf.

parole. Even those who decry sentencing any juvenile to life-without-parole admit that sentencing trends have headed toward greater severity. For instance, Amnesty International / Human Rights Watch candidly recognizes "[t]he dramatic increase in the imposition of life without parole sentences" on juvenile criminals:

> [S]tates have by no means abandoned the use of life without parole for child offenders: the estimated rate at which the sentence is imposed on children nationwide remains at least three times higher today than it was fifteen years ago.

Amnesty International / Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 2-3 (2005).[27] Scholars opposed to the practice similarly admit to contrary developments, such as the reality that "[c]ourts regularly uphold [life-without-parole] sentences and extremely long terms of imprisonment imposed on twelve-, thirteen-, fourteen-, or fifteen-year-old youths." Feld, *supra*, at 67 (and collecting cases).

III. STATE LEGISLATURES ARE BEST SITUATED TO SET JUVENILE SENTENCING POLICIES.

Calibrating juvenile sentences implicates profound political, sociological, philosophical and moral issues. Consequently, actors accountable to the people should be the ones to shoulder, and answer for, this difficult task. This is always where

---

[27] Report available at http://www.hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf.

our nation has deliberated the delicate issues presented by juvenile crime and punishment.[28] Thus, in 1996 the U.S. Department of Justice could report that

> States are well along in developing innovative approaches to the vexing problem of juvenile violence while still maintaining, for the majority of juvenile law violators, a system of juvenile justice that preserves the hopeful aspects of a system premised on the malleability of youth.

O.J.J.D.P. REPORT, *supra*, at iii. Given their accumulated wisdom and political accountability, weighing the application of juvenile life-without-parole sentences should remain firmly within the States' discretion.

A. Officials Who Calibrate Juvenile Sentencing Must Remain Directly Accountable to Their Citizens.

It is a simple fact that our nationwide trend toward stringent juvenile sentences has grown out of considered legislative responses to increased

---

[28] *See, e.g.*, Feld, *supra*, at 12-17 & nn. 3, 17, 21 (discussing history of juvenile court system) (citing, *inter alia*, David S. Tannenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, *in* A CENTURY OF JUVENILE JUSTICE 42, 46 (Margaret K. Rosenheim *et al.* eds. 2002); JOHN SUTTON, STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES 122 (1988); ELLEN RYERSON, THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT 22 (1978)).

violent juvenile offenses.[29] The unfortunate but undeniable reality is that the United States has higher rates of juvenile crime than most Western nations.[30] But the incidence and nature of juvenile crime has varied over time, and will continue to

---

[29] *See, e.g.*, Human Rights Watch, *supra*, at 15 (reporting that "[s]tarting in the mid-1980s, the United States experienced a steep and troubling increase in violent crime, including violent crime by adolescents"); Feld, *supra*, at 29 (observing that a "sharp spike in juvenile arrests for violence and homicide occurred between 1986 and 1994" and that "[t]he overall arrest rates of all youths for violent index crimes increased nearly two-thirds (66%)") (and collecting sources); Logan, *supra*, at 681 n.1 (reporting that "[b]etween 1983 and 1992, juveniles accounted for 25% of the increase in murders, forcible rapes, and robberies" and "[b]etween 1988 and 1992, the number of juveniles arrested for murder increased by 51% (as opposed to 9% for adults)") (and collecting sources)); O.J.J.D.P. REPORT, *supra*, at xi (reporting in 1996 that "[n]early every State has taken legislative or executive action in response to escalating juvenile arrests for violent crime and public perception of a violent juvenile crime epidemic").

[30] *See, e.g.*, Charles D. Stimson & Andrew M. Grossman, ADULT TIME FOR ADULT CRIMES: LIFE WITHOUT PAROLE FOR JUVENILE KILLERS AND VIOLENT TEENS 21-22 (Heritage Foundation, Center for Legal and Judicial Studies Aug. 2009) ("ADULT TIME FOR ADULT CRIMES") (reporting that the United States "ranks highly in every category" of juvenile crime statistics) (citing statistical evidence from DIVISION FOR POLICY ANALYSIS AND PUBLIC AFFAIRS, UNITED NATIONS OFFICE ON DRUGS AND CRIME, SEVENTH UNITED NATIONS SURVEY OF CRIME TRENDS AND OPERATIONS OF CRIMINAL JUSTICE SYSTEMS (1998-2000) 99-100, 154-155 (2004), *available at* http://wwwundoc.org/pdf/crime/seventh_survey/7pv.pdf); WORLD HEALTH ORGANIZATION, WORLD REPORT ON VIOLENCE AND HEALTH 28-29 (2002), *available at* http://whqlibdoc.who.int/hq/2002/9241545615.pdf)).

fluctuate.[31] Only politically-accountable state (and federal) representatives have the necessary flexibility and incentives to adjust juvenile sentences to changing circumstances. Consequently, it is to those same representatives that pleas to mitigate or enlarge—or abolish—juvenile life-without-parole sentences are properly made. *See, e.g.*, Feld, *supra*, at 76-81 (discussing state legislative consideration).

Political accountability is critical here, because adjusting juvenile sentences is not a mere bookkeeping exercise. It is instead a delicate endeavor bound up with competing philosophies of crime and punishment. Movement toward stricter sentences over recent decades thus "represents both a reaction to the increasingly serious nature of juvenile crime and a fundamental shift in juvenile justice philosophy." O.J.J.D.P. REPORT, *supra*, at xi.

Well-known are the longstanding debates over "root cause" versus responsibility-based theories of crime, and over rehabilitative versus retributive approaches to punishment.[32] As juvenile sentencing

---

[31] *See, e.g.*, Feld, *supra*, at 12 & n.1 (noting "oscillating" nature of youth crime policies) (and citing THOMAS J. BERNARD, THE CYCLE OF JUVENILE VIOLENCE (1992)); ADULT TIME FOR ADULT CRIMES, *supra*, at 19-21 (noting that, according to U.S. Department of Justice, "between 1994 and 2004, the arrest rate for juveniles for violent crimes fell 49 percent, only to see a 2 percent uptick in 2005 and then a 4 percent gain in 2006") (citing Howard Snyder, *Juvenile Arrests 2006*, JUVENILE JUSTICE BULLETIN, Nov. 2008, at 1)).

[32] *See, e.g.*, Feld, *supra*, at 25-42 (chronicling the philosophical and sociological debates over juvenile punishment) (and collecting sources); Logan, *supra*, at 685-86 (discussing these debates and observing that "[i]n recent years

scholar Barry Feld has explained, "[t]he ideology, structure, and practices of juvenile justice evolved over time in a politically contested context." Feld, *supra*, at 16-17. Consequently, the U.S. Department of Justice accurately described the last several decades' trend towards stricter juvenile punishment as "a fundamental philosophical departure, particularly in the handling of serious and violent juvenile offenders" that has "resulted in dramatic shifts in the areas of jurisdiction, sentencing, correctional programming, confidentiality, and victims of crime." O.J.J.D.P. REPORT, *supra*, at xi. It is precisely because "the Eighth Amendment does not mandate adoption of any one penological theory," *Harmelin*, 501 U.S., at 999 (Kennedy, J., concurring), that the Constitution leaves to the accumulated wisdom of State actors the resolution of these profound questions.

B. States Have Crafted Juvenile Sentencing Policies that Wisely Balance Justice with Mercy.

The States have been at the forefront of confronting the delicate issues presented in these cases. For instance, in 2006 the Colorado Legislature adopted a somewhat more rehabilitative sentencing model by lowering the maximum sentence for a juvenile convicted of a class 1 felony from mandatory life-without-parole to mandatory life with parole possible after 40 years. *See* 2006

... juvenile justice has experienced a sea-change in philosophy and practice"); ADULT TIME FOR ADULT CRIMES, *supra*, at 19-20 (observing that "[t]he root causes of this epidemic have been debated, studied, tested, and analyzed for decades").

COLO. LEGIS. SERV. Ch. 228 (H.B. 06-1315) (July 1, 2006) (amending, *inter alia*, COLO. REV. STAT. ANN. § 18-1.3-401(4)(b) (2009)). In doing so, Colorado embraced some of the same philosophical premises about juvenile psycho-social development that Petitioners themselves advocate. *See id.* Ch. 228 §1 (reciting legislative declarations); *and see* Brief for Petitioner at 11-41, *Sullivan v. Florida*, No. 08-7621 (U.S. Jul. 16, 2009).[33] Texas, too, has recently amended its penal law to remove mandatory juvenile life-without-parole for a capital felony. *See* 2009 TEX. SESS. LAW SERV. Ch. 765 (S.B. 839) (Sept. 1, 2009) (amending TEX. PENAL CODE § 12.31 (2009)). Instead, Texas now imposes a mandatory life sentence with parole eligibility after 40 years. *See* TEX. GOV'T CODE § 508.145(b) (2009).[34]

---

[33] Similarly, in 2007 a state commission recommended that the North Carolina Legislature adopt certain changes to its juvenile sentencing policy based on a "more rehabilitative" model. *See* REPORT ON STUDY OF YOUTHFUL OFFENDERS at IV(1), cmt. (a) (North Carolina Sentencing and Policy Advisory Comm'n) (March 2007), *available at* www.nccourts.org/Courts/CRS/Councils/spac/Documents/yo_finalreporttolegislature.pdf; *see also* Feld, *supra*, at 80-81 (discussing North Carolina commission proposal). A bill entitled the "Youth Accountability Act" (H.B. 1414) is currently pending in a House committee and, if adopted, would raise the age of an adult from 16 to 18 over a period of years, but would still require mandatory transfer of anyone over 13 for a Class A felony. The current text of the bill and a summary of action on the bill can be found at: http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2009&BillID=H1414.

[34] Bills pending in the Michigan Legislature would remove the possibility of juvenile life-without parole. *See* H.B.

Of course, legislative developments such as those in Colorado and Texas lie at the margins of the nationwide picture.[35] Other States—such as Alaska, Delaware, and Nevada—have recently gone in the opposite direction by toughening their juvenile transfer laws.[36] But the overall picture, as described *supra* in Part II.A, is most telling: 90% of the States continue to allow life-without-parole sentences for a wide variety of violent crimes, as do the District of Columbia and the federal government.

And there is a deeper lesson to draw from State legislative developments: the States are well equipped to face the challenges of juvenile sentencing. States have carefully adjusted, and will

---

4518, 4594-95; S.B. 173-176, 1999 Leg., 95th Sess. (Mich. 2009), *analysis available at* http://www.legislature.mi.gov.

[35] *See, e.g.*, Feld, *supra*, at 77-78 (observing that only "[a] few state legislatures have taken some initial steps" towards mitigating juvenile sentencing, and discussing only Colorado as eliminating mandatory life-without-parole); Redding, *supra*, at 1 (observing that, while most States have toughened juvenile transfer laws over the past three decades, "very recently, some States have reduced the scope of transfer laws") (citing Bishop, *Injustice and irrationality in contemporary youth policy*, 3 CRIMINOLOGY & PUBLIC POLICY 633-44 (2004)).

[36] *See, e.g.*, Feld, *supra*, at 77 & n.362 (discussing enactment of more stringent juvenile transfer provision in Alaska (2005)) (referring to 2005 amendment to ALASKA STAT. § 41.12.030(a)); 74 DEL. LAWS c. 106, §§ 28, 33 (2003) (adding robbery first degree and assault first degree to those crimes requiring adult prosecution of any juvenile); NEV. SENATE BILL No. 235, § 2 (enacting new chapter 62B of the Nevada Revised Statutes related to juvenile transfer hearings) (eff. Oct. 1, 2009) (text and commentary available at http://www.leg.state.nv.us/75th2009/Bills/SB/SB235_EN.pdf).

continue to adjust, their sentencing policies to the continually changing incidence of juvenile crime. States have carefully weighed, and will continue to weigh, the nature of juvenile culpability, punishment, rehabilitation, and deterrence in all their dimensions—philosophical, moral, sociological, and scientific.

The most concrete confirmation of this is found in the kaleidoscope of state transfer provisions through which juveniles may become subject to adult sentences. *See generally* Parts II.A.1 & II.A.2, *supra* (detailing state transfer provisions). These mechanisms dramatize the States' profound investment in the problems of juvenile crime. Unsurprisingly, the States' approaches vary considerably. They allow, and sometimes mandate, juvenile transfer for adult prosecution at a wide range of ages for an array of offenses, reflecting "[t]he inherent nature of our federal system." *Harmelin*, 501 U.S., at 999 (Kennedy, J., concurring) (quoting *Solem*, 463 U.S., at 291 n.17).

But most importantly, the transfer provisions are concrete evidence of State expertise in juvenile sentencing. They show that the States have crafted mechanisms for addressing—with both realism and hope, rigor and compassion—the terrible dilemmas associated with sentencing juveniles for terrible crimes.

Ohio's transfer provision provides an excellent example of this sort of evenhanded sensitivity. *See generally* OHIO REV. CODE ANN. § 2152.12 (2000). In considering certain transfers, a juvenile court must deem the following factors to favor transfer:

- The nature of the harm done to the victim, *id.* § 2152.12(D)(1-2);
- Whether "the child's relationship with the victim facilitated the act charged," *id.* § 2152.12(D)(3);
- Whether "[t]he child allegedly committed the act charged for hire or as a part of a gang or other organized criminal activity," *id.* § 2152.12(D)(4);
- Whether the crime involved certain uses of a firearm, *id.* § 2152.12(D)(5);
- The child's juvenile record and whether "[t]he results of any previous juvenile sanctions and programs indicate that rehabilitation of the child will not occur in the juvenile system," *id.* § 2152.12(D)(6-7);
- Whether the "child is emotionally, physically, or psychologically mature enough for the transfer," *id.* § 2152.12(D)(8); and
- Whether "[t]here is ... sufficient time to rehabilitate the child within the juvenile system," *id.* § 2152.12(D)(9).

But the court must consider the following factors as *against* a transfer:

- Whether "[t]he victim induced or facilitated the act charged," *id.* § 2152.12(E)(1);
- The nature of the child's responsibility and whether "the child was under the negative influence or coercion of another person," *id.* § 2152.12(E)(2-3);

- The absence of physical harm to person or property, *id.* § 2152.12(E)(4);
- Whether "[t]he child is not emotionally, physically, or psychologically mature enough for the transfer," and whether "[t]he child has a mental illness or is a mentally retarded person, *id.* § 2152.12(E)(6-7); and
- Whether "[t]here is sufficient time to rehabilitate the child within the juvenile system and the level of security available in the juvenile system provides a reasonable assurance of public safety." *Id.* § 2152.12(E)(8).

While Ohio's transfer statute is unusually articulate, the state transfer mechanisms are filled with such requirements. Far from showing the States' thoughtless cruelty towards juvenile offenders, they are instead compelling evidence of their sensitivity, flexibility, and realism in dealing with juvenile violence.

CONCLUSION

When to be merciful to a juvenile who has committed a terrible crime? When to punish? What weight to give deterrence? What weight rehabilitation? And, most difficult of all: when to rule out the possibility of release? No one wants the responsibility for answering these agonizing questions, but they must be answered. The Constitution leaves that arduous but necessary task to the collective wisdom of the States and their citizens.

The Court should affirm the decisions of the Florida First District Court of Appeal.

Respectfully submitted,

JAMES D. "BUDDY" CALDWELL
Louisiana Attorney General
KYLE DUNCAN*
Appellate Chief
LOUISIANA DEPARTMENT OF JUSTICE
Post Office Box 94005
Baton Rouge, LA 70804
(225) 326-6008

Counsel for State *Amici Curiae*

September 21, 2009

*Counsel of Record

AMICUS CURIAE BRIEF

Nos. 08-7412 & 08-7621

Supreme Court, U.S.
FILED
JUL 2 3 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRITS OF CERTIORARI TO THE
DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF OF *AMICI CURIAE* OF THE MOTHERS AGAINST MURDERERS ASSOCIATION, ROBERT HOELSCHER, RUTH JOHNSON, AZIM KHAMISA, BILL PELKE, AQEELA SHERRILLS, TAMMI SMITH, AND LINDA WHITE IN SUPPORT OF PETITIONERS

ANGELA C. VIGIL
Counsel of Record
WILLIAM LYNCH SCHALLER
MICHAEL A. POLLARD
KAREN SEWELL
ERIC J. RAHN
JUSTINE E. BELYTSCHKO
BAKER & MCKENZIE LLP
Mellon Financial Center
1111 Brickell Avenue, Suite 1700
Miami, Florida 33131
(305) 789-8904

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iii

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. *Amici* urge the court to consider voices all victims, including those who oppose life without parole for juveniles because such sentences do not satisfy the principles of proportionality, rehabilitation and forgiveness. 2

II. The experiences of *amici* show that juvenile life without parole fails to appropriately reflect proportionality, rehabilitation and forgiveness. 5

A. Aqeela Sherrills knows firsthand that change is possible, and he believes that even his firstborn son's killer deserves a chance to change. . 6

B. Robert Hoelscher is tough on crime yet finds it inconceivable to sentence juveniles like adults for crimes committed under the misguided influence of youth. 10

Contents

Page

C. Tammi Smith feels her half-brother's killer has shown he deserves a second chance. 14

D. Linda White does not believe life sentences without the possibility of parole serve anyone. 17

E. Ruth Johnson does not believe the punishment fits the crime for the 17-year-old killer of her son. 20

F. Azim Khamisa is working together with the family of his son's killer to curb youth violence and help their communities heal. 22

G. Bill Pelke believes all juveniles, including his grandmother's killer, can be turned around. 24

H. Ninety-eight mothers of murder victims comprise *Mothers Against Murderers Association*, a non-profit organization created to serve victims who seek resolution and forgiveness as well as justice. 26

CONCLUSION 32

TABLE OF CITED AUTHORITIES

Page

Cases

Atkins v. Virginia, 536 U.S. 304 (2002) 3

Other Authorities

Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771 2

Elizabeth Cauffman & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741 (2000) 4

L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAV. REVS. 417 (2000) ... 3

Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1 (1992) 3-4

The Victims' Rights Amendment, 42 Harv. J. on Legis. 525 (2005) 2

INTEREST OF *AMICI*[1]

Amici are individuals who have lost family members to violent crime committed by juveniles yet oppose life sentences without the possibility of parole for juveniles. *Amici* also include an organization whose mission focuses on assisting such crime victims and whose activities and experiences have led the organization to stand against life sentences without parole for juveniles. Because the interests of other juvenile crime victims will be uniquely and significantly impacted by the resolution of this case, *amici* submit their testimonials in hopes of giving voice to their reasoned opposition to juvenile life without parole.

SUMMARY OF ARGUMENT

Recognizing that this Court is examining whether criminal acts less severe than murder merit a sentence of life without parole where the offenders are juveniles, *amici* urge the Court to hold that this sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment. Victims differ in their views on proportionality of punishment for juvenile offenders and the importance of allowing juvenile offenders to be released from prison upon rehabilitation. In considering what is cruel and unusual, therefore, this Court should not assume all victims would support the continued

---

[1] The parties have consented to the filing of amicus briefs in this case and filed consent letters with the Clerk. This brief was not authored in whole or part by counsel for a party, and no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

imposition of life without parole sentences upon juveniles. *Amici* contend that proportionality, rehabilitation and forgiveness must be the governing principles of juvenile sentencing. These principles are ill-served by sentencing children to life without the possibility of parole.

ARGUMENT

I. *AMICI* URGE THE COURT TO CONSIDER VOICES OF ALL VICTIMS, INCLUDING THOSE WHO OPPOSE LIFE WITHOUT PAROLE FOR JUVENILES BECAUSE SUCH SENTENCES DO NOT SATISFY THE PRINCIPLES OF PROPORTIONALITY, REHABILITATION AND FORGIVENESS.

Victims who constitute *amici* here believe proportionality, rehabilitation and forgiveness must guide decisions involving the sentencing of juvenile offenders. They advocate for those strongly-held values to be reflected as paramount in our nation's juvenile justice system.

The federal government and all 50 states legislatively recognize the victim's voice in sentencing defendants, including juveniles. *See, e.g.*, Victoria Schwartz, Comment, *The Victims' Rights Amendment*, 42 Harv. J. on Legis. 525, 526 & n.13 (2005) (listing victims' rights statutes); Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771. The various statutes reflect the importance of considering victims' views of both the harm suffered and the proper punishment for defendants.

Proportionality is central to our penal system. It is axiomatic that a defendant should not be punished to a greater extent than the offense merits. *See Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (and cases cited therein). This fundamental tenet is captured in the Eighth Amendment's prohibition against cruel and unusual punishment, which forbids penalties that are disproportionate to the offense. *See id.* A penalty is constitutionally disproportionate if it is out of step with contemporary societal values. *Id.* at 312. In addition to examining objective evidence of contemporary values, this Court has said that it must also bring its own reasoned judgment to bear on whether a particular form of punishment is constitutionally disproportionate. *Id.* at 313. Because victims' voices are legally relevant to sentencing courts across the nation, *amici* urge this Court to consider *amici's* experiences as a particularly poignant indicator of contemporary values that should inform this Court's reasoned judgment.

Amici have experienced firsthand what science is now documenting. As addressed in other *amicus* briefs submitted in support of Petitioners, landmark scientific research now reveals that adolescents are less capable of controlling their behavior than adults. Recent psychological, neurological and behavioral studies establish that children cannot appreciate consequences and assess risk and harm the way adults can, in part because their brains continue to develop through their teen years. *See, e.g.*, L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAV. REVS. 417, 421 (2000); Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12

DEVELOPMENTAL REV. 1, 9-11 (1992); Elizabeth Cauffman & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 742 (2000); Elizabeth R. Sowell et al., *Development of Cortical and Subcortical Brain Structures in Childhood and Adolescence: A Structural MRI Study*, 44 DEVELOPMENTAL MED. & CHILD NEUROLOGY 4 (2002). Thus, *amici* believe that punishing children to the same extent as adults – who are mentally and developmentally capable of assessing the consequences and impact of their crimes in a way children cannot – offends the core principle of proportionality.

Amici believe that children are fundamentally redeemable. The principle of rehabilitation – providing offenders a second chance at a productive, law-abiding life – has special resonance in cases involving juvenile offenders. The same studies cited above also show that juveniles can be successfully rehabilitated. This brief contains several accounts where *amici* have personally witnessed the rehabilitation of the juveniles they have come to know through tragic events. They have observed that juvenile offenders mature and develop through participation in rehabilitation programs. Many *amici* recognize that the adult still serving the prison sentence is an entirely different person from the juvenile who committed the crime that led to the original sentence. For these reasons, *amici* believe juvenile offenders should be offered a legitimate chance at complete rehabilitation which they feel cannot be attained without the possibility of parole. After they have completed an appropriate punishment for their significant crimes, these young people should have the

opportunity to prove that they deserve a second chance before their whole lives have been wasted in prison.

Amici value forgiveness and advocate for the juvenile justice system to recognize this value. The following testimonials demonstrate how individual victims came to forgive. Equally importantly, the accounts below show the significant role that forgiveness played in helping them overcome these tragic events and in recognizing that life without parole is an inappropriate sentence for children.

II. THE EXPERIENCES OF *AMICI* SHOW THAT JUVENILE LIFE WITHOUT PAROLE FAILS TO APPROPRIATELY REFLECT PROPORTIONALITY, REHABILITATION AND FORGIVENESS.

The specific accounts below show why *amici* hold such firm beliefs. These real-life experiences should form the backdrop for this Court's evaluation of how the principles of proportionality, rehabilitation and forgiveness bear on the constitutionality of juvenile life without parole. It is the high regard in which *amici* and other similarly-situated victims hold these related principles that has led them to advocate for an end to life without parole for juveniles.

A. Aqeela Sherrills knows firsthand that change is possible, and he believes that even his firstborn son's killer deserves a chance to change.

A few short months after his son's death, while on the set of the television show "America's Most Wanted," Aqeela shocked the detective working his case. Aqeela told him that he did not want Terrell's teenaged killer, if caught, to spend the rest of his life in prison. The detective was incredulous. "Like many others, he just didn't understand how I could not want this kid to go away for life." Aqeela did not relent, though, and even as he pled for the killer – a 17-year-old gang member – to turn himself in to authorities, he reiterated to the police, to family and to friends that his primary concern was in getting the killer the help that he needed to heal.

Even before Terrell's death, Aqeela had been opposed to life without parole for juveniles. Coming of age in the Watts neighborhood of south-central Los Angeles, he began working to end gang conflict as a young man. A one-time gang member himself, Aqeela made a discovery during his first year in college that would lead him to dedicate his life to violence prevention and the promotion of community and healing. Aqeela realized, "that my friends and I had been living under conditions that had been supported by a set of unwritten rules. Most of us hadn't really understood what we were doing, and we didn't understand how these 'rules' had impacted our lives. We were just following them because if we didn't, there would be consequences." These "rules" – rules about loyalty, love and revenge – often predetermined the results of even the smallest conflict.

The unfortunate result, Aqeela observed, was that much of the violence that plagued his neighborhood resulted from "knee-jerk reactions which, themselves, resulted from the immaturity of the people involved in the conflict."

Early in his life, Aqeela came to realize that the majority of those "rules"-driven conflicts were eminently preventable. Usually, the underlying causes of the conflict were not, in fact, interpersonal problems between the perpetrator and the victim. "Most of the conflicts that I dealt with during my 16 years on the front lines had to do with peoples' deeper wounds, many of which had been inflicted by sexual, physical or psychological abuse. These wounds had been left untreated because it was taboo to talk about them." The real problem, as Aqeela sees it, is that people, especially children, have been deeply wounded – mentally, emotionally or otherwise – early in their lives. The "rules" that govern life in what Aqeela calls the "relentless" streets of Watts and other neighborhoods across the country have foreclosed the possibility of treating those wounds. Young people carry the burden of that hurt yet simultaneously lack life experience and coping skills. When they enter into even the smallest conflict situation, the conflict quickly spirals to a point where adherence to the "rules" often leads to violence and bloodshed. For Aqeela, the only way to confront the juvenile criminal activity is to focus on healing the wounds and changing people's attitudes about adherence to those "rules" that do nothing but harm them.

Aqeela knows that such changes can be accomplished. His actions and experience give credibility to this belief. Specifically, Aqeela was the driving force behind brokering a 1992 peace treaty between the Los Angeles Bloods and Crips street gangs. From this and other similar experiences, and from the discoveries he has made about himself and his community, Aqeela knows that people, especially juveniles, are "basically good" and able to redeem themselves. Life imprisonment of juveniles who commit even the most heinous of crimes is not the answer because it fails to recognize that many offenders commit their acts because of their own wounds and adherence to a set of false "rules." Those wounds could be healed and juvenile offenders can learn that these "rules" make no sense.

Aqeela had hoped that he would never be faced with as close a personal challenge to his beliefs about juvenile sentencing as he faced on January 10, 2004. Around 11:45 p.m., Aqeela received a phone call from his son Terrell's close friend who told him that Terrell had been shot while attending a party in an affluent neighborhood. When Aqeela arrived at the hospital, a doctor explained that, despite his best efforts, Terrell had died of the gunshot wounds. Aqeela recalls feeling "totally defeated. That's the only way to describe it." He could not understand why someone would have wanted to shoot Terrell, his dynamic, charismatic, firstborn son. The circumstances of the shooting were frustratingly inexplicable: Terrell had been talking with his friends when the 17-year-old killer shot Terrell in the back multiple times. Looking back, Aqeela wishes that the killer had stopped to consider his actions even for a moment and had spoken with Terrell. The killer "would have gotten an entirely different read on my son."

In the midst of his suffering, Aqeela was confronted by numerous friends and family members who wanted to seek revenge. Terrell's killer had been quickly identified through the street network, and friends and family assured Aqeela revenge would be swift and precise. Aqeela stood his ground, not only demanding that the juvenile killer not be harmed, but also telling the detective on the case that he did not want the killer to go to jail for the rest of his life. Rather, Aqeela wanted to meet the killer and his parents. He wanted to know what had gone wrong and what wounds the killer carried. Most of all, he wanted to be sure the killer received appropriate care while carrying out his sentence.

Aqeela had spent his adult life seeking an end to conflict and promoting healing. He knew seeking revenge was "required" under the unwritten "rules," but, in seeking revenge, he would be sacrificing all that he and his community had achieved through his anti-violence work. The same, Aqeela believed, would be true if the killer was sent to prison for the rest of his life. "I recognized that the community could not afford to lose another child. It is imperative that we give people, especially children, a second chance and the opportunity to redeem themselves."

To Aqeela, imprisoning the 17-year-old for the rest of his life was an unjust punishment for someone who was likely failed by the people entrusted with his care: "when children commit a crime, it is a sign that parents have failed." Aqeela recognized that his son's killer, while having committed a heinous crime, was still a person who could contribute positively to his community. He wants the killer to be given the opportunity he needs to

heal his wounds and to recognize that the "rules" that he had followed no longer control his actions. For Aqeela, it is clear that his son's teenaged killer can be forever changed if he can recognize that his action likely resulted from an immature inability to deal with his own problems and a knee-jerk adherence to the "rules."

Aqeela does not feel that he holds these beliefs alone: "Terrell speaks through me against life imprisonment for juveniles."

B. Robert Hoelscher is tough on crime yet finds it inconceivable to sentence juveniles like adults for crimes committed under the misguided influence of youth.

In April 1961, when Robert Hoelscher was seven, his father was murdered by a troubled 17-year-old from his neighborhood in Houston, Texas. Robert's mother found her husband's body on the floor of the convenience store that Robert's father managed. Robert's father had partially lost his hearing while serving in World War II, so he never heard his assailant coming. He was shot in the back. The teenage killer was quickly apprehended with the murder weapon and the money he had stolen. He was tried and sentenced to life in prison. He remains in prison today, nearly 50 years later.

Robert and his five brothers and sisters were left without a father and, in many ways, the trauma that their mother experienced took her from them, too. Robert's mother spent the majority of her remaining

days struggling with addiction to nicotine, alcohol and pain killers. She died of cancer at age 57. As the middle child of six, Robert was the prototypical "lost child" of an alcoholic parent. He retreated into a withdrawn, quiet, and contented persona to cope with his difficult home life. Robert's family never discussed his father's death or their feelings about the event. It was not until well into adulthood that Robert found himself retelling the story time and time again to support a cause he came to champion.

Robert has spent a decade working in the criminal justice system and with juveniles specifically. His work began in 2001 as a volunteer for the Innocence Project of New Orleans. In only one year, Robert's hard work and dedication earned him a promotion to be the organization's first executive director. Although it is no longer his full-time job, Robert has never stopped his innocence work. He remains deeply connected to efforts to reform criminal justice in this country and continues to volunteer. Robert recognizes that his work experience may even eclipse his father's death in terms of the impact on his views on justice.

His innocence work notwithstanding, Robert has never considered himself an activist. He credits his initial attraction to this cause to the book *Actual Innocence* by Barry Scheck, Peter Neufeld and Jim Dwyer. The universal experience of a child wrongly accused of even a non-violent act resonated with Robert and helped him connect to the impetus behind the Innocence Project. He invested himself in criminal

justice reform, believing his connection to the cause had little to do with his father's death or the teenager who killed his father, and more to do with empathy and logic. Robert does not base his opposition to life sentences for children on an emotional response to a tragic personal event. Robert's views on juvenile life without parole, the death penalty and the need for an enlightened criminal sentencing paradigm for youth rests on pragmatism.

It was only several years later that a more personal motivation emerged. On a visit to one of his sisters, Robert came across a newspaper account of his father's murder. The article described a phone call his mother had made to the parents of her husband's killer. Only two days after her husband's murder, Robert's mother made the call to express her forgiveness and the sadness she felt for their son as a fellow parent. She told them that hate simply would not bring back the father of her children, so she had chosen to forgive. This news reflected a side of Robert's mother that had been lost to him in her later life.

Robert was deeply moved when he read about his mother's commitment to forgiveness in the immediate aftermath of unspeakable tragedy. The story reminded Robert that in these cases there is always loss on both sides. He felt his mother's gesture had to have afforded some healing to the parents of his father's killer. In some way, reading this story also provided Robert some sense of closure. "If there is any real life experience that can be called 'closure,' reading about my mother's phone

call was it for me." It was an emotional confirmation of the logic of the path he had taken.

To Robert, that logic is quite simple and compelling. As to the role of punishment, Robert says very matter-of-factly: "My father's killer took a human life. He needed to be held accountable. He was." As to the public safety concern, he says: "My father's killer could have taken someone else's life. He needed to be put in a place where he was no longer a threat to anyone else. He was." In terms of redemption, Robert is equally practical and straightforward. "When a person makes a mistake, he deserves a chance to make up for that mistake. If a prisoner can demonstrate that he is ready to go home and play by the rules, then we should provide that opportunity." Further, from a fiscal responsibility standpoint, Robert sees little sense in keeping someone in prison for life when the person could be contributing to society and paying tax dollars instead of spending them.

Self-described as "tough on crime," Robert's sense of logic compels his position "that juvenile life without parole offenders should have a path – hard earned to be sure – back to the community." He believes simply that juveniles are different from adults. He finds it unreasoned and peculiar that the criminal justice system seems to assume that a higher sentence for a juvenile who commits a more serious crime is appropriate because the more serious crime reflects a higher, rather than lower, level of maturity and accountability. "By any reasonable measure," he thinks, "that is wrongheaded logic. If anyone imprisoned for life deserves a second

chance at life, it is those individuals whose criminal acts were committed under the misguided influence of youth."

C. Tammi Smith feels her half-brother's killer has shown he deserves a second chance.

Tammi Smith grew up in the same dysfunctional household in Grand Rapids, Michigan, as her half-brother, Robert Sellon, whom she always thought of as her full brother. When Tammi was not quite 15-years-old, Tammi's mother threw Tammi, Robert and their other siblings out of the house. They all went in separate directions. Robert was already spending most of his time managing a local pool hall, so that simply became his residence.

On the night of October, 26, 1981, two 17-year-old brothers, David and Michael Samel, went to the pool hall where Robert lived. They had heard a drug shipment was being stored there. Since both brothers suffered drug addiction and were in desperate need of money, they headed to the pool hall intending to steal the shipment. However, the information they had received was wrong. Once they realized that there were no drugs at the pool hall, they decided to rob Robert. He put up a fight, and the two brothers beat him to death. At his trial, Michael pled guilty to second degree murder and received a prison sentence. David's counsel believed that, because Michael had pled guilty, David's case would be dismissed. However, his case not only proceeded to trial on first degree murder, but also resulted in a sentence of life in prison without parole for David.

Initially, Tammi was enraged by what these boys had done to Robert, and she hoped that the Samels would be imprisoned for the rest of their lives for their crime. She had recurring nightmares about the attack, and prior to David being transferred from pre-trial detention to permanent incarceration, Tammi visited him only to express her hatred of him face-to-face. However, this opportunity to express her anger to the offender did not provide her with the closure she desired.

As the years went on, Tammi looked to her Christian faith to help her work through her anger, and she eventually forgave the Samels for their crime. Yet even after embracing forgiveness, there was still an unresolved question that prevented her from achieving closure: What kind of adults had Michael and David become in prison? The question haunted her. In 2001, when she realized that Michael would soon be released from prison, she and her half-sister started corresponding with both Samels brothers and were able to visit them in prison. As she learned more about them, she saw that they were no longer drug-addicted, naïve teenagers, but mature adult men who felt extreme remorse over the crime committed in their youth. "David has talked about how childish he was, and he will beat himself up over it," she says. David has even expressed to her "that if he could give his life to bring her half-brother back, he would."

Michael has now been released, but David remains in prison. Tammi favors and will help to seek David's release. Tammi says that "he would be a better person out than wasting his life just sitting in prison – he could give something back."

Tammi Smith not only is seeking David's release but also opposes all juvenile life without parole: "It is just not right to put a teenager in prison for the rest of their lives thinking they are never going to change." Her own childhood experience plays a significant role in her views on sentencing juveniles to life in prison without the possibility of parole. She explains that as a youth, "there were a lot of things I did wrong in my life, but I would not want to have a mark against me for the rest of my life." She views David Samel similarly, saying he is not the same person now as he was as a teenager, and that he should not continue to be punished for the mistakes of his youth. It is clear to her that David would never commit a similar crime again.

Rather than focusing only on her own suffering, Tammi holds herself responsible to uphold the principles Robert would have had. Release is what Tammi believes Robert would have wanted. In getting to know the brothers, Tammi has often thought, "my brother would probably get along with these guys." She also knows that Robert, who himself committed minor crimes as a juvenile, including dealing drugs, would want someone like David to have a second chance. "He would have said, 'I deserve a second chance if I am the one in prison,' so David does too."

Tammi feels society is better served by releasing juveniles who have sufficiently demonstrated remorse for their crimes and who have applied themselves during their time in prison. She is inspired by David's commitment to using his time in prison to educate himself. She is gratified to hear David say that, should he ever be released, he wants to help juveniles who have

been convicted of crimes. "David wants to show he is sorry by giving back. He has a good heart and wants to help people." For Tammi, the thought that David will never have the opportunity to be a productive member of society is tragic, especially when there are other criminals who serve shorter sentences and never demonstrate the remorse and positive growth David has.

Unfortunately, Tammi knows that, for now, David's dream of re-entering society and using all he has learned during his time in prison to help others is not a reality. Instead, 27 years after being convicted for killing Robert, David is still confined to prison and faces the possibility that he will continue to pay for his crime until he dies in prison.

D. Linda White does not believe life sentences without the possibility of parole serve anyone.

Linda White had not given significant thought to the appropriateness of sentencing children to life without parole prior to November 18, 1986. That was the day that her 26-year-old daughter Cathy, then two months pregnant, was raped and killed by two 15-year-old boys.

Cathy was approached by her killers at a gas station and yielded to the boys' seemingly innocent request for a ride. Once inside Cathy's car, the boys brandished a stolen handgun, forced Cathy to drive toward Alvin, Texas, and then ordered her to stop just south of Houston, where they raped her. Drunk and high, the boys then shot Cathy in the leg with the intent to debilitate her. When they came to the sudden realization

that Cathy could identify them, they killed her and drove away from the scene in her car. Linda and her family did not learn of Cathy's fate until four days after her disappearance and murder. The killers were arrested and confessed to the police. They pled guilty to Cathy's murder and rape and received 54 and 55 years in prison, respectively.

Though the entry of the pleas gave Linda what she would later call "judicial closure," the long sentences meted out to the two boys did nothing to assuage the sadness that she felt. Nor did the pro-prison rhetoric she heard at her victims' support group provide any relief. Linda was only able to begin to come to terms with the horrific incident that had claimed Cathy's life when she began to confront "reality" about what had happened to her daughter and, significantly, to her daughter's killers.

Linda began to find this "reality" three years after Cathy's death. She enrolled in college-level courses and closely followed debates about the appropriate judicial response to criminal activity. She later learned about restorative justice, wanting to find and implement constructive solutions to the events that had torn her world apart. She went on to work with and teach inmates in Texas prisons. She has been heavily involved with the *Bridges to Life* program, offering victims and inmates the chance to gather and share stories in a supportive, healing-based environment. These thirteen years spent working in prisons and learning about criminal justice have given Linda the perspective that has allowed her to better cope with Cathy's death. Linda has come to know that prisons are horrible places, and

that sentencing anyone to spend their life in such an environment – without giving them an opportunity to make up for past wrongdoing – is an unusually cruel and pointless response to crime.

Linda does not believe that sentencing juveniles to life without parole is ever appropriate, no matter how serious their crimes may have been. "There is no way that a 13- year-old can be held responsible to make decisions the same as adults do." Linda's coursework in psychology has taught her that only adults have sufficient understanding of their actions and a developed ability to resist impulses. As with the boys who made a snap decision to murder her daughter, "juveniles aren't able to fully appreciate the long-term consequences of their actions."

Linda's experiences working directly with inmates much like the boys who killed Cathy have given her the opportunity to see firsthand the impact of the oppressive conditions imposed by a life without parole sentence. This experience has strengthened Linda's opposition to the sentence. Many of the inmates she has met have expressed remorse for their wrongdoing. They are focused on trying "to make up for the wrong they've done." Sentencing juveniles to life without parole deprives them of the opportunity to return to the world and "make up" for their wrongs.

Linda has come to terms with her daughter's rape and death not through seeking retribution, but through advocating for a more just solution that she knows serves her daughter, her daughter's killers and the country as a whole. "There is already enough pain and

violence in the world," Linda states. The infliction of additional violence upon others, especially juveniles, does not make sense to her. Linda knows that Cathy would not have wanted to see her killers locked away for the rest of their lives without the possibility of release. When Linda first had an opportunity to talk with one of her daughter's killers, she learned, for the first time, what her daughter's last words to them had been: "I forgive you, and God will, too." Of her advocacy of justice, Linda says, "Cathy would love what I am doing."

E. Ruth Johnson does not believe the punishment fits the crime for the 17-year-old killer of her son.

On December 7, 1987, just before his 23rd birthday, Ruth Johnson's son Steven was shot and killed by a 17-year-old drug dealer. Steven was sitting in a car next to his girlfriend unaware that their backseat passenger was armed. Without warning, the teenaged passenger opened fire on Steven and his girlfriend, shooting them multiple times. When the police arrived, Steven and his girlfriend were both found dead and the killer had fled the scene.

Ruth was shocked and devastated. She attended court hearings and the trial where the 17-year-old was found guilty of two counts of murder and one count of possessing a weapon. The teenager received a life sentence without parole. Following that final hearing, the case was closed – at least for purposes of the criminal justice system. For Ruth, neither the trial nor the sentencing stopped her pain.

Today, the teenager is a grown man and a life prisoner. Lynn McNeal has served 20 years of his sentence, yet Ruth's emotional wound remains open. Lynn turns 39 this year and is still the only person who has been arrested or taken any responsibility for Steven's death. An adult supplied him the bullets and adults ran the drug operation that led to the murders. Only Lynn ever went to prison.

Ruth does not doubt Lynn's culpability. She questions his sentence. Though Ruth was sitting in the courtroom during the short bench trial, she describes herself as having been "frozen" – unable to feel or listen to anything that was happening around her. She did not follow the trial or the legal arguments, and she barely noticed the teenager before her who was being sent away for life.

Twenty years later, Ruth reviewed the trial transcripts from this dark period and found herself unhappy with the process that led not only to a teenaged boy being held solely responsible for the crime against her son but also, and more importantly, to his being given such an unjust sentence. She learned that Lynn had been alone in a police station all night before he confessed without a parent or attorney to advise him. Ruth fears that he may only have confessed because he believed the police when they promised leniency because of his age. Although Ruth knows that the boy deserved a significant sanction for his crime, Lynn's continued imprisonment serves neither Ruth nor her community.

Ruth does not think the punishment fits the crime. For her, life without parole is not the right sentence for

a young member of a criminal business that buys and sells narcotics and eliminates anyone who gets in its way. It does not do justice to her son that the others in the drug ring were never questioned or arrested – nor does it serve her son or provide justice for her family when the teenage offender continues to serve a sentence decades after his mistake and will not ever be given the chance to make up for his crime outside of prison.

F. Azim Khamisa is working together with the family of his son's killer to curb youth violence and help their communities heal.

Azim Khamisa first confronted the issue of sentencing juveniles to life in prison without parole when his 20-year-old son Tariq, was shot dead by a gang member while delivering pizzas in San Diego on January 21, 1995.

Fourteen-year-old Tony Hicks shot Tariq on orders from a gang leader who was himself only 18. At the time, Tony was taking part in an initiation ritual where he and his fellow gang members ordered a pizza with the plan to steal the delivery man's cash when he arrived at the door. Tariq was the delivery man. When Tariq refused to turn over his money to the gang members, he was fatally shot by Tony. Five days later, Tony Hicks was arrested and ultimately prosecuted. He received a sentence of 25 years to life in prison.

On the news of his son's death, Azim's life "came to a crashing halt." He even felt suicidal. After taking nine months to begin to come to terms with his son's death, Azim set up the Tariq Khamisa Foundation ("TKF") and

approached someone who might seem to be an unlikely partner in this effort: Tony's grandfather, Ples Felix. Azim offered forgiveness and invited Tony's grandfather to work together to help put an end to youth violence. Through their joint efforts, TKF began to deliver youth education programs to prevent gang violence and murder.

It still took Azim five years to develop the courage to come face-to-face with his son's killer. When he looked into Tony's eyes during their first meeting, instead of feeling anger and revenge, Azim recognized Tony's humanity. Azim found himself looking into the eyes of a young boy, not a killer.

Azim realized that Tariq was not the only victim in this incident. Victims lay at "both ends of the gun." While his son was the victim of a killer, the killer himself was a victim of society. Tony was born to a 15-year-old single mother and was rejected by his father. At an early age, Tony witnessed the death of his cousin and suffered abuse from his uncle's girlfriend. He was then sent to live with a relative.

Azim is in regular contact with Tony in prison. Azim realizes that young offenders can be reformed and has been working to reduce Tony's sentence. Tony is studying in jail and has now passed his college exams. Azim has offered Tony a job in his foundation should he ever be released. Azim believes Tony will be more useful to society by working for TKF than by spending his life in prison.

Despite having a demanding job, Azim dedicates virtually all of his remaining time to TKF and other projects, such as The Forgiveness Project and the Constant and Never Ending Improvement Program ("CANEI"), all of which work towards restorative justice for young people. Azim has worked with these organizations for 15 years. Azim has also published several books in this area, including *From Murder to Forgiveness*, *From Forgiveness to Fulfillment* and *The Secrets of a Bulletproof Spirit*. He has spoken globally on these issues and has won various international awards in this area, including the California Peace Prize by the California Wellness Foundation, the National Crime Victims Special Community Service Award presented by President Bill Clinton and Attorney General Janet Reno, and the Season for Nonviolence Peace Hero Award. Although he had to pay a high price, Azim feels that he now leads a fulfilling life.

Through his hard work and dedication to this cause, Azim has realized the benefits of such restorative programs for juveniles. He believes that almost all juvenile offenders can be rehabilitated and integrated peacefully back into society. Young people make mistakes, but that does not make them unforgivable.

G. Bill Pelke believes all juveniles, including his grandmother's killer, can be turned around.

On May 14, 1985, Bill Pelke's grandmother was killed by a group of four teenaged girls. Everyone in Ruth Pelke's Gary, Indiana neighborhood knew that the elderly woman freely gave Bible lessons to local children who were interested. Tragically, this generosity led four

drunk and high teenagers to knock on her door pretending to want Bible lessons when they really wanted to steal money for video games. Ruth was an easy target. When she unsuspectingly turned to get them information for the lessons, one girl hit her over the head with a vase. Then, Paula Cooper, just 15 years old, stabbed Ruth 33 times. The teens managed to steal only 10 dollars and Ruth's car.

Paula was sentenced to death and initially placed on death row. Angry and frustrated, Bill supported the sentence and favored the media attention and publicity that it would bring in exposing the circumstances of his grandmother's death.

A year-and-a-half after Ruth's death, and three-and-a-half months after Paula was sentenced, Bill realized the death penalty was not, in fact, the most appropriate punishment for the killer of a spiritual woman with a tremendous faith in the Bible. Understanding that the death of any child would have deeply hurt his grandmother, Bill felt that the responsibility rested on his shoulders to seek justice in the way that his grandmother would approve.

This sense of responsibility led Bill to an help in an effort to collect signatures from two million people to overturn Paula's sentence. After three years, her sentence was reduced to 60 years, or 30 years with good behavior. During this time, Bill regularly exchanged letters with Paula. However, his first face-to-face meeting with Paula did not come until nine-and-a-half years after his grandmother's death, on Thanksgiving in 1994. In this meeting Bill was able to face the killer

and feel forgiveness instead of hate and anger. The key to Bill's forgiveness was his ability to feel compassion because he saw that Paula had the ability to reform. He continues to correspond with her today.

Bill is now convinced that Paula has reformed. She has obtained her GED and a college degree. She wants to help others who shared her experiences. Observing Paula's rehabilitation, Bill feels all juveniles can be turned around if given the right chance and environment. This provides him a sense of healing.

Today, Bill is president of Journey of Hope, an organization he co-founded with families of murder victims who oppose the death penalty. Bill is also the author of "Journey of Hope," has been featured in several publications, and speaks in a variety of forums on his experience. Bill witnessed Paula's successful rehabilitation in prison and sees it as proof that all juvenile offenders deserve the possibility of parole.

H. Ninety-eight mothers of murder victims comprise *Mothers Against Murderers Association*, a non-profit organization created to serve victims who seek resolution and forgiveness as well as justice.

At 6:30 p.m. every other Thursday night, mothers hold hands in West Palm Beach Florida and pray for themselves, for their families and for their murdered children. The non-profit organization Mothers Against Murderers Association ("MAMA") brings these women together and opens the floor to any of the 98 members who wish to voice an opinion or share a story. Some will talk about their day. Others may talk about children's

problems at school. And some will share thoughts about the murder of their loved ones, how they are healing, and whether they have found the strength to forgive. The healing circle is a spiritual experience in which MAMA members acknowledge the pain and anguish of losing a loved one and, over time, seek to forgive the murderer.

Angela Williams, MAMA's founder, has lost seven family members to murder. Her desire to cope with those murders – and to help other like her heal and survive these tragic events – inspired Angela to found MAMA in 2003. The organization's primary aim is to assist parents and guardians of murder victims. Many of them have had their lives forever altered by juvenile killers.

On March 20, 2001 Angela's 18-year-old nephew, Dtaurean Gidds, was murdered by 17-year-old Rogyne O'Neal during an attempted robbery. Dtaurean had been talking with his cousin when he was approached by two teenaged robbers. When Dtaurean revealed that he knew one of the robbers, Rogyne was startled. Afraid of being turned in, Rogyne fatally shot Dtaurean. Rogyne was arrested later that year. After his trial, he was sentenced to serve two life sentences.

As she has with all seven murderers responsible for the deaths in her family, Angela has come to forgive Rogyne. Angela understands the importance of forgiveness. She has had multiple experiences counseling other victims' family members who, unable to forgive, allowed anger to build up inside of them and developed obsessions with revenge. Angela has seen how

these people become trapped in their rage, unable to move beyond the tragedy and constantly reliving the pain of their loss. In her experience, too much focus on punishment of offenders – rather than on seeking justice for all involved through rehabilitation – worsens the situations. This is especially true in situations where the offenders are juveniles. As Angela explains, children – even those who commit the worst crimes – can and must be saved. For her, healing for victims' families and redemption of juvenile offenders are essential and synergistic: victims cannot heal unless child offenders are given a true chance at rehabilitation.

Led by Angela's example, MAMA's members stand against juvenile life sentences without parole. They believe that juvenile offenders can be redeemed and can transform their lives. MAMA members find juvenile life without parole sentences unacceptable because such sentences reject the possibility of restorative justice and deny juveniles a chance at redemption. Angela summarizes MAMA's ethos saying, "We're about forgiveness and we're about saving the children." For many of MAMA's members, that forgiveness takes on true meaning when they engage in helping another child – even if that child is the killer of their own son or daughter. MAMA members recognize that "My child won't come back so why shouldn't I help this child have a second chance?" Angela says, of MAMA members, "We can't help our kids anymore but we can help someone else's."

MAMA's focus is not only on forgiveness but finality. Finality does not result from a correctional institution that forecloses parole review for a juvenile offender. For

MAMA, finality is accomplished only when a juvenile offender has changed direction through rehabilitation and has become a contributing member of the community. Finality comes when a child has been rehabilitated and is released from prison. It is this sense of finality that leads to true "closure." Angela explains: "You only reach finality by helping someone else. Not just take, take, take. You have to give back."

MAMA gives back by counseling and guiding children who begin to display criminal tendencies. The organization has developed an educational component that encourages members to share their own experiences of loss with jailed juvenile offenders. MAMA volunteers teach the children how to consider the consequences of their actions and contribute to, rather than endanger, their communities. MAMA members know that many juvenile offenders come from at-risk communities and families. Even these children are still in their formative years and can overcome this disadvantaged beginning. But they need help. As Angela reiterates over and over, "You have to save the children. That's what the focus is on, saving the kids."

Tangenika Williams, another MAMA member, agrees that juvenile offenders deserve a second chance. She believes that the still-unidentified killer who claimed her husband's life in a June 25, 2005 drive-by shooting should "do the time for the crime." But she also believes that if the killer was a juvenile – as she suspects – the killer deserves a "second chance at life." She recognizes that juveniles' "brains aren't like adults" and that juveniles are more susceptible to snap decisions resulting from, among other things, peer pressure. Most

important for Tangenika is that the killer, if a juvenile, is given a real opportunity at reformation and rehabilitation. She believes that children should be punished differently than adults: "children need guidance, not a life spent in the penitentiary."

Tangenika, Angela and other MAMA members continue to bring their message of forgiveness and healing to others in the community. MAMA provides family members comfort, often beginning just hours after a murder victim has been found and even at the crime scenes. They counsel grieving parents and try to talk down angry family members who cannot see past their rage and only want revenge. The experience of these crime victim mothers has taught them that it takes a tremendous commitment to help family members of victims. MAMA strives to provide a vital source of continuing support and healing, something which may otherwise be unavailable. MAMA also works actively with both the police and the community to encourage witnesses to help solve murders. MAMA is dedicated to providing a variety of programs for children aimed at helping them cope with loss and turning them away from violence. MAMA's extensive advocacy and activism has given it a unique perspective on and stake in juvenile justice issues.

Angela and other members of MAMA have long recognized that kids "make bad judgments, do bad things; they're not really realizing what they're doing. They're not taught the right things." MAMA members believe that juvenile offenders, still in their formative years of development, have the chance to change only if someone will reach out them. MAMA aims to help the

community fill that role and opposes juvenile life without parole because it is antithetical to their goal: to give both victims and juvenile offenders "a chance at life again."

****

It may be contrary to our assumptions that victims of violent crime would be as forgiving as the victims who constitute *amici* here. But the rationale for their opinions is supported by the sometimes emotional, sometimes spiritual and always personal journey they have traveled. For *amici*, this journey has led them to a place where they advocate to see the juvenile killers of their family members freed after they have paid the price for their crimes and shown that they have been rehabilitated. In their own ways, each account reveals a recognition that proportionality in sentencing is essential and that locking a child away forever for a crime committed before that child was fully developed and accountable is inconsistent with the principle of proportionality. Each account reflects the significant impact of successful rehabilitation on the healing of the victim's family and the way that this process of rehabilitation engenders a parallel process of forgiveness in so many victims.

Amici reject juvenile life without parole for the ultimate crime of murder. Their experiences should inform this Court's view of whether such a cruel punishment is ever appropriate for children in non-murder cases. It is not. Juvenile life without parole is unconstitutional in large part because it fails to take into account that sentencing does not necessarily

become more just with permanence. It is only through a permanent focus on proportionality, rehabilitation and forgiveness that our system of sentencing of juveniles can be restorative and successful for victims, offenders and communities.

CONCLUSION

For the reason set forth above, *amici* respectfully request that this Court reverse the ruling of the court below.

Respectfully submitted,

ANGELA C. VIGIL
Counsel of Record
WILLIAM LYNCH SCHALLER
MICHAEL A. POLLARD
KAREN SEWELL
ERIC J. RAHN
JUSTINE E. BELYTSCHKO
BAKER & MCKENZIE LLP
Mellon Financial Center
1111 Brickell Avenue, Suite 1700
Miami, Florida 33131
(305) 789-8904

Counsel for Amici Curiae

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JUL 23 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writs Of Certiorari to the District Court Of Appeal, First District, State Of Florida

BRIEF FOR THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE & JUSTICE, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

JOHN PAYTON
Director-Counsel
DEBO P. ADEGBILE
CHRISTINA SWARNS
JIN HEE LEE
*VINCENT M. SOUTHERLAND
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
99 Hudson St., 16th Floor
New York, NY 10013
(212) 965-2200
**Counsel of Record*

Additional counsel listed inside cover

CHARLES J. OGLETREE, JR.
ROBERT J. SMITH
CHARLES HAMILTON HOUSTON
INSTITUTE FOR RACE & JUSTICE
125 Mt. Auburn St., 3rd Floor
Cambridge, MA 02138

JEFFREY L. FISHER
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1660 L St., NW, 12th Floor
Washington, DC 20036

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, amici NAACP Legal Defense and Educational Fund, Inc., Charles Hamilton Houston Institute for Race and Justice, and National Association of Criminal Defense Lawyers certify that each are non-profit corporations with no parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Challenges of Developing an Effective Attorney-Client Relationship with a Teenager 4

A. A Child's Tendency to Mistrust Adults Impedes the Development of a Proper Attorney-Client Relationship 7

B. Adolescents' Limited Comprehension of Core Legal Concepts, Institutional Actors, and the Adjudicatory Process Complicates the Development of an Effective Attorney-Client Relationship 11

C. Adolescent Deficits in Judgment, Temporal Perspective and Susceptibility to Peer Influence Hamper Effective Representation of a Child Client 12

II. Compromised Attorney/Child-Client Relationships Hinder Defense Counsel's Ability To Conduct A Constitutionally Appropriate Factual Investigation 15

III. Compromised Attorney/Child-Client Relationships Can Yield Flawed Decisions to Accept or Reject Plea Bargains 19

IV. Compromised Attorney/Child-Client Relationships Can Contribute to Children Facing Inappropriately Harsh Prison Conditions 25

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Atkins v. Virginia, 536 U.S. 304 (2002) 3
Florida v. Nixon, 543 U.S. 175 (2004) 20
Gideon v. Wainwright, 372 U.S. 335 (1963) 5
Hunt v. Blackburn, 128 U.S. 464 (1888) 16
Illinois v. Wardlow, 528 U.S. 119 (2000) 10
In re Gault, 387 U.S. 1 (1967) 3,5
In re Winship, 397 U.S. 358 (1970) 3
Kennedy v. Louisiana, 554 U.S. ____, 128 S. Ct. 2641 (2008) 17
Kent v. United States, 383 U.S. 541 (1966) 3
McCarthy v. United States, 394 U.S. 459 (1969) 21
Morris v. Slappy, 461 U.S. 1 (1983) 5
Powell v. Alabama, 287 U S. 45 (1932) 5
Roper v. Simmons, 543 U.S. 563 (2005) 3,4,5,12
Strickland v. Washington, 466 U.S. 668 (1984) 5,15,16, 18
Thompson v. Oklahoma, 487 U.S. 833 (1988) 4
United States v. Leviner, 31 F. Supp. 2d 23 (D. Mass. 1998) 10
Upjohn Co. v. United States, 449 U.S. 383 (1981) 16
Wiggins v. Smith, 539 U.S. 510 (2003) 15
Williams v. Taylor, 529 U.S. 362 (2000) 15

U.S. Constitution and Statutes

U.S. Const. amend. VIII 3,4,6,27

Other Authorities

A.B.A. Standards for Criminal Justice: Prosecution & Def. Function, Standard 4-3.2(a) 15, 16

A.B.A. Standards for Criminal Justice: Prosecution & Def. Function, Standard 4-6.1(b) 19-20

Paolo G. Annino, *Children in Florida Adult Prisons: A Call for a Moratorium*, 28 Fla. St. U. L. Rev. 471 (2001) 25

Paolo G. Annino et al., *Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to the Nation* (July 2009) 8

Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 Colum. Hum. Rts. L. Rev. 573 (2008) 8

Douglas A. Berman, *From Lawlessness To Too Much Law?: Exploring the Risk of Disparity from Differences in Defense Counsel Under Guidelines Sentencing*, 87 Iowa L. Rev. 435 (2002) 20

Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 Crime & Just. 81 (2000) 10, 11, 25, 26

Donna M. Bishop & Hillary Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights*

Provided by In Re Gault, 60 Rutgers L. Rev. 125 (2007) 13-14

C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. Kan. L. Rev. 659 (2005) 2,6,7,21

Laura Cohen & Randi Mandelbaum, *Kids Will Be Kids: Creating a Framework for Interviewing and Counseling Adolescent Clients*, 79 Temp. L. Rev. 357 (2006) 12, 13, 14,17

Douglas L. Colbert et al., *Do Attorneys Really Matter?: The Empirical and Legal Case for the Right of Counsel at Bail*, 23 Cardozo L. Rev. 1719 (2002) 18

Steven Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. Ky. L. Rev. 257 (2007)..... 4

Jeffrey Fagan, *This Will Hurt Me More Than It Hurts You*, 16 Notre Dame J.L. Ethics & Pub. Pol'y 1 (2002) 25

Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 Conn. L. Rev. 569 (1998) 20

Barry Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed*, 34 N. Ky. L. Rev. 189 (2007)..... 9,12

Barry Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J. L. & Fam. Stud. 11 (2007)..... 13

Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol'y & L. 3, 16 (1997) 7,11,23

Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A comparison of Adolescents' and Adults' Capacities as Trial Defendants,* 27 Law and Hum. Behav. No. 4, 333 (2005) 24

Samuel Gross, *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523 (2005) 4

Janet C. Hoeffel, *Toward a More Robust Right to Counsel of Choice*, 44 San Diego L. Rev. 525 (2007) 10, 17, 22

Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 Notre Dame L. Rev. 245 (2006) 12, 13, 14

Theresa Hughes, *A Paradigm of Youth Client Satisfaction: Heightening Professional Responsibility for Children's Advocates*, 40 Colum. J.L. & Soc. Probs. 551 (2007) 7, 13

Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Youth Offenders in the United States in 2008* (2008) 9

Michelle Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 Golden Gate U. L. Rev. 345 (1997) 10

Amanda M. Kellar, *They're Just Kids: Does Incarcerating Juveniles With Adults Violate the Eighth Amendment?*, 40 Suffolk U. L. Rev. 155 (2006) 25

Sheldon Krantz et al., The Right to Counsel in Criminal Cases: The Mandate of *Argersinger v. Hamlin* (1976) 18

Michael Lindsay, *The Impact of Gault on the Representation of Minority Youth*, 44 No. 3 Crim. Law Bulletin 4 (2008) 9

Nat'l Council on Crime and Delinquency, *And Justice for Some: Differential Treatment of Youth of Color in the Justice System*, (Jan. 2007) 9

Kenneth Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DePaul L. Rev. 679 (2002) 9

Michael Pinard, *The Logistical and Ethnical Difficulties of Informing Juveniles About the Collateral Consequences of Adjudications*, 6 Nev. L. J. 1111 (2006) 13, 24

Patricia Puritz & Katayoon Majd, *Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense Practice*, 45 Fam. Ct. Rev. 466 (2007) 6, 10, 21

Melinda Schmidt et al., *Effectiveness of Participation as a Defendant: The Attorney-Juvenile Client Relationship*, 21 Behav. Sci. Law 175, 179 (2003) 22

Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. Rev. 793, 816 (2005) 14, 23

Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental*

Perspective on Juvenile Justice Reform, 88 J. Crim. L. & Criminology 137 (1997) 7, 13

Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 Tex. L. Rev. 799 (2003)..... 6

Abbe Smith, *"I Ain't Takin No Plea": The Challenges in Counseling Young People Facing Serious Time*, 60 Rutgers L. Rev. 11 (2007) 19

Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann. Rev. Clin. Psych. 459 (2009).....2, 6, 11, 13, 14, 17, 26

U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Disproportionate Minority Confinement 2002 Update* (Sept. 2004) 9

U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Minorities in the Juvenile Justice System* (Dec. 1999)..... 8

U.S. Dep't of Justice, *OJJDP Statistical Briefing Book* (2008) 10

U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juveniles in Corrections* (June 2004) 8

Julie Whitman & Robert Davis, *Snitches Get Stitches: Youth Gangs, and Witness Intimidation in Massachusetts*, The National Center for Victims of Crime (2007)..... 18

INTEREST OF AMICUS CURIAE[1]

The NAACP Legal Defense & Educational Fund, Inc. (LDF), is a non-profit corporation formed to assist African Americans and others who are unable, on account of poverty, to employ legal counsel to secure their rights by the prosecution of lawsuits. LDF has a long-standing concern with the impact of racial discrimination on the criminal justice system. It has served as counsel of record and/or as *amicus curiae* in this Court in, *inter alia*, *Furman v. Georgia*, 408 U.S. 238 (1972), *McClesky v. Kemp*, 481 U.S. 279 (1987), *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972) and *Ham v. South Carolina*, 409 U.S. 524 (1973) and appeared as *amicus curiae* in *Roper v. Simmons*, 543 U.S. 551 (2005), *Kimbrough v. United States*, 552 U.S. 85 (2007), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and *Batson v. Kentucky*, 476 U.S. 79 (1986).

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School (CHHIRJ) continues the unfinished work of Charles Hamilton Houston, one of the Twentieth Century's most talented legal scholars and litigators. The CHHIRJ marshals resources to advance Houston's dreams for a more equitable and just society. It brings together students, faculty, practitioners, civil rights and business leaders, community advocates, litigators,

---

[1] Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. Pursuant to S. Ct. Rule 37.6, counsel for the *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than the *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

and policymakers to focus on, among other things, reforming criminal justice policies.

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives is the promotion of the proper administration of justice.

SUMMARY OF ARGUMENT

Experience, science and this Court's precedents all recognize that children are fundamentally different than adults.[2] One of the most significant aspects

---

[2] Since its inception, the juvenile justice system has countered the stark differences between youth and adults through "individual assessment and treatment" of children in an effort to reintegrate young offenders into society. C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. Kan. L. Rev. 659, 667 (2005); *see also* Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann. Rev. Clin. Psych. 459, 462 (2009) ("[I]t is clear that the founders of the juvenile justice system

of this difference is that children who commit criminal offenses are less culpable than adults. *Roper v. Simmons*, 543 US. 563, 569-70 (2005). These principles bear directly on the constitutionality of juvenile life without parole sentences. Such sentences fail to comport with the requirements of the Eighth Amendment for the reasons raised by the Petitioners and supporting *amici* and because the unique characteristics of youth can critically undermine defense counsel's ability to effectively assist their teenaged clients, and the compromised attorney-client relationship contributes to an increased likelihood of unreliable sentencing outcomes that fail to reflect culpability and guilt. *Atkins v. Virginia*, 536 U.S. 304, 320 (2002). For these reasons, individuals younger than age 18 at the time of the offense should not be subject to life without parole sentences.

ARGUMENT

This brief explains how the characteristics of youth can interfere with the development of an effective attorney-client relationship and how the impaired relationship with counsel, in combination with the concerns raised by Petitioners and their

---

began from the premise that adolescents are developmentally different from adults in ways that should affect our interpretation and assessment of their criminal acts."). This Court has appropriately addressed the developmental concerns of youth by affording children the rehabilitative benefits of the juvenile justice system and such procedural and substantive safeguards rooted in due process as the rights to counsel, confrontation, cross examination, proof beyond a reasonable doubt and freedom from compelled self-incrimination. *See In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966).

supporting *amici*, so undermine the reliability of life without parole sentences that such punishments are unconstitutionally disproportionate for children younger than age 18 at the time of the offense.

This Court has acknowledged that a child's immature judgment, impulsive decision-making and vulnerability to peer pressure reduce culpability such that the capital sentencing of offenders younger than age 18 violates the Eighth Amendment. *See Roper*, 543 U.S. at 569-70; *Thompson v. Oklahoma*, 487 U.S. 833, 834-35 (1988). These attributes, in addition to the dynamics of race, class and the nature of indigent defense, can also disadvantage a child's relationship with counsel and contribute to a significant risk of an unreliable sentencing outcome that fails to reflect actual culpability.[3] Given the severity and finality of a death-in-prison sentence, this Court should categorically exempt children from life without parole sentences.

I. The Challenges of Developing an Effective Attorney-Client Relationship with a Teenager.

A criminal defense attorney's ability to effectively represent her client and fairly subject the prosecu-

---

[3] *See* Samuel Gross, *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 545, 548-51 and Table 6 (2005) (describing unreliable outcomes for children and adolescents in the criminal justice system and noting higher concentration of false confessions among adolescent as compared to adult exonerees); *see also* Steven Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. Ky. L. Rev. 257 (2007) (discussing characteristics of children, juvenile, and criminal justice system that lead to wrongful convictions).

tion's case to "a reliable adversarial testing process," *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (citations omitted), is critically dependent on the existence of a trusting attorney-client relationship and the client's ability to assist counsel, guided by a meaningful understanding of the legal proceedings. *See Powell v. Alabama*, 287 U.S. 45, 69 (1932) (stating that defendants need "the guiding hand of counsel at every step in the proceedings against [them]").[4]

This Court has acknowledged that children, as a class, "lack [ ] maturity and [possess] an underdeveloped sense of responsibility [that] often result[s] in impetuous and ill-considered actions and decisions," are "vulnerable and susceptible to negative influences and outside pressures," and have a "transitory, less fixed" personality. *Roper*, 543 U.S. at 569 (citations omitted). Experts consistently concur with this Court's assessment and note that each of these youthful qualities, which are rooted in the neurological differences between adults and children,[5] can

---

[4] *See also Morris v. Slappy*, 461 U.S. 1, 21 n.4 (1983) (citing A.B.A. Standards for Criminal Justice, commentary to § 4.29 (2d ed. 1980)) ("Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence."); *Gault*, 387 U.S. at 36 (1967) (determining that a child "needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it"); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (describing the right to counsel as "fundamental and essential to fair trials").

[5] These unique characteristics of adolescent children are a direct product of the neurological development of the brains prior to adulthood. The frontal lobe of the brain, which "man-

and often do impede a child's judgment, decision-making, and ability to develop the trust, confidence and open communication necessary for an effective attorney-client relationship. *See* Steinberg, *supra* note 2, at 468-71; Patricia Puritz & Katayoon Majd, *Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense Practice*, 45 Fam. Ct. Rev. 466, 474 (2007).

Many characteristics of youth complicate the development of a proper attorney-client relationship. As detailed below, a teenager's tendency to distrust adults, limited understanding of the criminal justice system and the role of the defense lawyer within it, deficits in judgment, and considerations of race and class combine to inhibit the development of an effective attorney/child-client relationship and further demonstrate how juvenile life without parole sentences cannot be reconciled with the Eighth Amendment.

---

ages impulse control, long-term planning, priority setting, calibration of risk and reward and insight [,] is still growing and changing during adolescence and beyond . . . ." Abbe Smith, *"I Ain't Takin No Plea": The Challenges in Counseling Young People Facing Serious Time*, 60 Rutgers L. Rev. 11, 20 (2007); *see also* Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 Tex. L. Rev. 799, 816 (2003) (discussing the connection between brain development, judgment, and decision-making). "[T]asks involving planning, self control, inhibiting impulsive actions, learning from experience, social judgment, and weighing rewards and risks in decision-making situations" may not reach full development "until adolescents reach their twenties." Clarke, *supra* note 2, at 710.

A. A Child's Tendency to Mistrust Adults Impedes the Development of a Proper Attorney-Client Relationship.

The well-known failure of adolescents to relate to and trust adults and authority figures presents a fundamental impediment to the candid communication necessary for an effective attorney-client relationship. *See* Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol'y & L. 3, 16 (1997) (explaining that this mistrust may be the product of the natural adolescent stage of a child working through "developmental issues of independence and identity" or from previous experiences with adult authority figures). A child's process of "establishing autonomy from . . . parents" can manifest itself in a "rebellion against parental values . . . until late adolescence or early adulthood." Clarke, *supra* note 2, at 697 (footnotes omitted); *see also* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. Crim. L. & Criminology 137, 156 (1997) ((citing Terrie Moffitt, *Adolescent-Limited and Life Course Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 Psychol. Rev. 674 (1993)) noting that "adolescents are striving for elusive autonomy from parental and adult authority in a context in which most privileges of adult status are withheld"). As a result of this process, adolescents are notoriously "reluctant to participate in conversation with adults or answer their questions . . . ." Theresa Hughes, *A Paradigm of Youth Client Satisfaction: Heightening Professional Responsibility for Children's Advocates*, 40 Colum. J. L. & Soc. Probs. 551, 566 (2007).

This adolescent aversion is likely to affect the attorney-client relationship because "lawyers are not familiar figures in children's lives, unlike teachers, doctors, and nurses. . . . [Y]outh are more likely than adults to refuse to speak with their attorney, thereby inhibiting the effectiveness of the representation." *Id.* at 566-67 (footnotes omitted). As a result, children are more likely to distrust counsel and are less likely to engage in the type of communication required for an effective relationship with an attorney.

Trust barriers may also be exacerbated by the cross-racial nature of many attorney/child-client relationships.[6] African-American children are overrepresented[7] among those subjected to life-without- -

---

[6] *See* Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 Colum. Hum. Rts. L. Rev. 573, 596 (2008) (describing cross racial nature of representation for children).

[7] The overrepresentation of African-American children in the criminal justice system is a well documented subject of numerous respected studies. The United States Department of Justice, Office of Justice Programs noted that in 2004, minority youth comprised 70% of juveniles held in custody for violent offenses, and that black youth were twice as likely as white youth to be sentenced to prison. *See* U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juveniles in Corrections*, 9, 21 (June 2004). In 1999, DOJ found that "[m]ore than three-quarters of youth newly admitted to State prison were minorities." U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, *Minorities in the Juvenile Justice System*, 15 (Dec. 1999); *see also* Paolo G. Annino et al., *Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to the Nation*, 3 (July 2009) (finding that in Florida, the state from which the two cases before this Court arise, 84% of the total population of children serving life without parole for non-homicide offenses are African American);

parole sentences,[8] and many factors—including the phenomenon of racial profiling and the negative impression of the criminal justice system that it naturally produces—are likely to breed significant mistrust of the criminal justice system and its actors, including defense attorneys, among African-

---

Barry Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed*, 34 N. Ky. L. Rev. 189, 252 (2007) ("[F]orty-one of forty-two states found minority youths overrepresented in secure detention facilities and all thirteen states that analyzed institutional commitment decisions reported disproportionate minority confinement."); Michael Lindsay, *The Impact of Gault on the Representation of Minority Youth*, 44 No. 3 Crim. Law Bulletin 4 (2008) (African-American youth are in the juvenile justice system are "most consistently, and pervasively overrepresented across the United States."); Nat'l Council on Crime and Delinquency, *And Justice for Some: Differential Treatment of Youth of Color in the Justice System*, 3, 34 (Jan. 2007) (finding that in 2002, three out of four adolescents who were newly admitted into adult prisons were youth of color, and "African American youth accounted for 58% of total admissions to adult prisons"); Kenneth Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DePaul L. Rev. 679, 686-87 (2002) (discussing the racial disparities present in the juvenile justice system and disproportionate number of African-American youth arrested, detained, charged and sentenced); U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Disproportionate Minority Confinement 2002 Update*, 2 (Sept. 2004) (examining data from 1990-1997 and describing African-American youth as overrepresented at all stages of the juvenile justice system compared with their proportion in the U.S. population).

[8] *See* Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Youth Offenders in the United States in 2008*, 39 (2008) (stating that nationwide, black teenagers are ten times more likely to receive life-without-parole sentences than their white counterparts and African Americans constitute 60% of youth serving life without parole sentences).

American youth.[9] *See, e.g., Illinois v. Wardlow*, 528 U.S. 119, 133-34 nn.9-10 (2000) (Stevens, J., concurring in part and dissenting in part) (noting the prevalence of racial profiling by law enforcement against citizens of color); *U.S. v. Leviner*, 31 F. Supp. 2d 23, 33 & n.26 (D. Mass. 1998) (describing the criminal history score of an African-American defendant as reflective of racial disparities that have grown out of racial profiling). This problem of distrust may also be enhanced among poor children who must rely on appointed counsel whose commitment to zealous advocacy the child may doubt. *See* Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 Crime & Just. 81, 136-37 (2000) (footnote omitted) (finding several respondents in the study to be "especially critical of public defenders, whom they believed feigned advocacy in an effort to manipulate them to accept pleas that were not in their best interests"); Puritz, *supra*, at 474 (citing studies "suggest[ing] that children are less likely to trust or communicate with attorneys whom they know are court-appointed").[10]

---

[9] *See* Michelle Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 Golden Gate U. L. Rev. 345, 377 (1997) (discussing influence of cultural dynamics on attorney-client relationship); Puritz, *supra* at 472 ("Research indicates that African American children . . . are consistently less likely than their White counterparts to trust their defense attorneys.").

[10] As of 2007, African-American and Hispanic youth were nearly three times as likely to live in poverty as white youth. U.S. Dept. of Justice, *OJJDP Statistical Briefing Book* (2008), *available at http://ojjdp.ncjrs.gov/ojstatbb/population/qa0140.asp.qaDate=2007.*

Thus the trust necessary for an effective and collaborative relationship between attorney and client is often undermined by an adolescent defendant's age-based likelihood to distrust counsel.

B. Adolescents' Limited Comprehension of Core Legal Concepts, Institutional Actors, and the Adjudicatory Process Complicates the Development of an Effective Attorney-Client Relationship.

The attorney-client relationship and its critical requirement of confidentiality are difficult concepts that few children can fully understand. Children often assume that their lawyers are required to report the substance of their communications to the court or other authority figures, such as police officers or parents. Youth under age 19 often "incorrectly believe[ ] that [a defense] attorney was authorized to tell judges or police officers what was discussed in confidential attorney-defendant conversations." Grisso, *supra*, at 15 (citations omitted). Moreover, children "may develop a belief that all adults involved in the proceedings are allied against [them], perhaps after seeing defense attorneys and prosecutors chatting together outside the courtroom." Steinberg, *supra* note 2, at 475. Accordingly, "[m]any youths fail[ ] to differentiate the roles and functions of judges, prosecutors, and defense counsel, whom they perceived as one, and as adversarial." Bishop, *supra*, at 136.

These mistaken beliefs can have devastating consequences. "[A] child who is unpersuaded by his attorney's loyalty may simply withhold information from the attorney, depriving both the attorney and

the child of an opportunity to exchange important insights in the case." Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 Notre Dame L. Rev. 245, 273 (2006).

C. Adolescent Deficits in Judgment, Temporal Perspective and Susceptibility to Peer Influence Hamper Effective Representation of a Child Client.

A young client's immaturity in judgment and limited temporal perspective may frustrate the development of a viable relationship between counsel and client. *See* Feld, *supra* note 7, at 225 ("[G]eneric developmental limitations impair juveniles' ability to understand legal proceedings, make rational decisions, and assist counsel."); Henning, *supra*, at 272-73 (discussing influence of peers, temporal perspective and deficits in judgment on decision-making and relationship with counsel). "It has been noted that 'adolescents are overrepresented statistically in virtually every category of reckless behavior.'" *Roper*, 543 U.S. at 569 (quoting Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339 (1992)). It is therefore not surprising that deficiencies in judgment can also prevent a child from fully considering all available adjudicative options and limit his or her ability to "assess or integrate long-term consequences into their analysis." Laura Cohen & Randi Mandelbaum, *Kids Will Be Kids: Creating a Framework for Interviewing and Counseling Adolescent Clients*, 79 Temp. L. Rev. 357, 367 (2006). For example, an adolescent "engaging in a cost-benefit analysis [may] 'weigh the particular cost or benefit[s]'" of certain choices dif-

ferently from an adult who possesses the experience and temporal perspective to make well-reasoned choices. *Id.* at 368 (quoting Elizabeth S. Scott, et al. *Evaluating Adolescent Decision Making in Legal Contexts*, 19 L. & Hum. Behav. 221, 233 (1995)). Similarly, an adolescent may "withhold information from his attorney in order to feel the immediate benefit of not fully incriminating himself, but fail to recognize the long-term costs of compromising his own defense . . . ." Henning, *supra*, at 273; *see also* Hughes, *supra*, at 565 (noting the difficulty children have in comprehending the role of a lawyer and the influence on information sharing caused by differences between children and adults in future orientation, cost-benefit analytical processes, and the child's focus on immediate gains).[11]

---

[11] *See also* Barry Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J. L. & Fam. Stud. 11, 53 (2007) (noting that adolescents "undersestimate the magnitude or probability of risks, use a shorter time-frame, and focus more on potential gains rather than losses" as compared to adults); Michael Pinard, *The Logistical and Ethical Difficulties*, 6 Nev. L. J. 1111, 1121 (2006) ("[S]tudies have found both that [children] do not understand the various phases of the criminal process and that they cannot fully comprehend long-term consequences (or tend to ignore these consequences in favor or immediate consequences) . . . ."); Scott, *Evolution*, *supra*, at 171 (noting that a youth's narrow temporal perspective, which leads to a focus on short-term rather than long-term consequences, limited concept of time and tendency to take risks can "influence judgments about the value of accepting plea bargains"); Steinberg, *supra* note 2, at 475 ("Immature youths may lack capacities to process information and exercise reason adequately in making trial decisions, especially when the options are complex and their consequences are far reaching."); Donna M. Bishop & Hillary Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with*

The influential role that a teenager's peers may play in the decision-making process also has the potential to impede the development of a proper relationship between counsel and client. "Peer influence affects adolescent judgment both directly and indirectly." Steinberg, *supra* note 2, at 469. Adolescents may "make choices in response to direct peer pressure" or act in ways that relate to their "desire for peer approval and consequent fear of rejection . . . ." *Id.* As a result, judgments about collaboration and cooperation with authorities and counsel are sometimes made through the often illegitimate filter of a child's feelings about how decisions will inform and define their role among peers. *See* Cohen, *supra*, at 363-64 (discussing the influence of peers on adolescent decision-making); Henning, *supra*, at 273 (same); Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. Rev. 793, 816 (2005) ("[S]ubstantial evidence supports that adolescents are more susceptible to peer influence than adults. . . . At least during the period of early- and mid- adolescence, decisions often are driven by acquiescence or opposition to authority or by efforts to gain peer approval (or avoid peer rejection)."); Cohen, *supra*, at 363 ("Susceptibility to peer influence appears to increase between childhood and early adolescence, peaks at about age fourteen, and then . . . decreases into early adulthood.").

---

the Legal Rights Provided by In Re Gault, 60 Rutgers L. Rev. 125, 158-59 (2007) (explaining that "perceived difference between a sentence of five years and ten years is a lot less meaningful to a teen than to an adult").

Thus, an attorney's ability to develop a constitutionally effective relationship with a child client is often impaired by the characteristics of youth.

II. Compromised Attorney/Child-Client Relationships Hinder Defense Counsel's Ability To Conduct a Constitutionally Appropriate Factual Investigation.

As detailed above, the characteristics of youth can significantly complicate the development of a proper attorney-client relationship. An attorney's capacity to adequately investigate his child-client's case is directly affected by this compromised relationship.

The duty to investigate is a vital component of every defense attorney's constitutional obligation to his or her client. *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000); *Wiggins v. Smith*, 539 U.S. 510, 522-27 (2003); *Strickland*, 466 U.S. at 690-91; *see also* A.B.A. Standards for Criminal Justice: Prosecution & Def. Function, Standard 4-3.2(a) ("[D]efense counsel should seek to determine all relevant facts known to the accused . . . [a]s soon as practicable."). A lawyer's ability to conduct an adequate defense investigation is, in turn, dependent upon her ability to communicate with the client.

> Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. . . . For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may

> be considerably diminished or eliminated altogether. . . . In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Strickland, 466 U.S. at 691 (citation omitted); *see also* A.B.A. Standard for Criminal Justice: Prosecution & Def. Function, Standard 4-3.2, cmt. ("The client is usually the lawyer's primary source of information for an effective defense.").[12]

"A trusting client is far more likely to reveal facts and details that not only help in formulating the defense, but, in the absence of broad discovery rules, help the attorney learn more about the prosecution's case." Janet C. Hoeffel, *Toward a More Robust Right to Counsel of Choice*, 44 San Diego L. Rev. 525, 541-42 (2007) (citing *Morris*, 461 U.S. at 20-21). A lawyer-client relationship characterized by suspicion and mistrust will leave an attorney less likely to learn critical facts and less able to provide effective

---

[12] *See also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (the attorney-client privilege was developed "to encourage full and frank communication between attorneys and their clients" in recognition of the fact "that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) ("The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity . . . of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.").

representation. Thus open communication is a necessary precursor to an adequate factual investigation and "is well recognized by the courts and ethical rules as 'the cornerstone of the adversary system.'" Hoeffel, *supra*, at 541-42 (quoting *Linton v. Perini*, 656 F.2d 207, 212 (6th Cir. 1981)).

As described in Section I.A, *supra*, the communication needed to shape counsel's investigation can be significantly precluded by a teenager's natural mistrust of adults. A child may be unwilling to share relevant factual information regarding her case or refuse to speak with her attorney at all, thereby narrowing the scope and adequacy of counsel's investigation.

Additionally, a child's "ability to receive and communicate information adequately . . . may be compromised by impairments in attention, memory, and concentration," and this can and often does impede an attorney's capacity to elicit the information necessary for a constitutionally adequate investigation. Steinberg, *supra* note 2, at 475. Specifically, children may experience difficulty "respond[ing] to instructions or . . . provid[ing] important information to [counsel], such as a coherent account of the events surrounding the offense." *Id.*; *see also Kennedy v. Louisiana*, 554 U.S. ___, 128 S. Ct. 2641, 2663 (2008) ("The problem of unreliable, induced, and even imagined child testimony means there is a 'special risk of wrongful execution' in some child rape cases." (quoting *Atkins*, 536 U.S. at 321)); Cohen, *supra*, at 360 (explaining that youth inhibits counsel's ability to gather information from a child client).

Furthermore, as discussed in Section I.C, *supra*, a child may, to her own detriment, place greater value in protecting her peers or winning their approval than providing counsel with the factual information necessary for appropriate investigative efforts. *See* Julie Whitman & Robert Davis, *Snitches Get Stitches: Youth Gangs and Witness Intimidation in Massachusetts*, The National Center for Victims of Crime, 47 (2007) (detailing results of a study showing that "the idea of being viewed as a snitch was a huge deterrent to reporting crime for youth" and that "youth do not want to be labeled and rejected by their neighbors or peers for snitching").

A child's failure to relate all necessary and relevant information to defense counsel can have devastating consequences for the outcome of her case. When defense counsel is not provided with all of the information necessary for an adequate investigation, "the defendant can be harmed by the inevitable narrowing of vision when the full flexibility of disposition is not considered." Sheldon Krantz et al., The Right to Counsel in Criminal Cases: The Mandate of *Argersinger v. Hamlin* 184 (1976); *see also Strickland*, 466 U.S. at 691 ("[C]ounsel has a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary."); Douglas L. Colbert et al., *Do Attorneys Really Matter?: The Empirical and Legal Case for the Right of Counsel at Bail*, 23 Cardozo L. Rev. 1719, 1763, 1776 (2002) (explaining that those who are held in pretrial detention "are more likely to be convicted and to receive a harsher sentence than people freed pending trial," largely because "the defense's ability to locate witnesses is greatly en-

hanced" when a client gains pretrial release since "[m]any potential witnesses are more likely to cooperate and provide information when the lawyer, an unfamiliar face and frequently from a different race and class background, is accompanied by someone they know."). Determinative evidence may go undiscovered. Strategic decisions regarding the representation will be limited by the disadvantage suffered by counsel who is not privy to all the facts at issue. Potentially viable defense theories may be discarded because counsel lacks the factual clarity that a client who was willing to communicate could provide. Accordingly, for child defendants who have not fully communicated all relevant information to counsel, the chances of suffering an extremely harsh and potentially inappropriate sentencing outcome are substantially increased.

III. Compromised Attorney/Child-Client Relationships Can Yield Flawed Decisions to Accept or Reject Plea Bargains.

Defense counsel's diminished ability to obtain vital information from an adolescent client can also have a profound impact on plea negotiations. In order to evaluate the appropriateness of a plea bargain, counsel must have a clear command of all relevant facts. Indeed, the American Bar Association cautions that "[u]nder no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation . . . has been completed . . . ." A.B.A. Standards for Criminal Justice: Prosecution & Def. Function, Standard 4-

6.1(b).[13] As previously discussed, and for a variety of reasons, children often struggle to convey information to counsel and may be unable or unwilling to provide their attorney with all necessary facts and information about their case. As a result, the ability of both the attorney and client to effectively analyze the appropriateness of a plea bargain is critically reduced.

Additionally, a child client must fully understand the conditions and obligations of a plea bargain as well as the rights that will be waived. "A guilty plea . . . is an event of signal significance in a criminal proceeding. . . . [A]nd the high stakes for the defendant require 'the utmost solicitude.'" *Florida v. Nixon*, 543 U.S. 175, 187-88 (2004) (quoting *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)). Criminal proceedings that expose children to the possibility of a life-without-parole sentence require the child defendant to take stock of a wide range of possible sentencing alternatives and consider the long-term consequences of decisions made during the adjudicatory process:

---

[13] *See also* Douglas A. Berman, *From Lawlessness To Too Much Law?: Exploring the Risk of Disparity from Differences in Defense Counsel Under Guidelines Sentencing*, 87 Iowa L. Rev. 435, 446 (2002) ("From the very outset of representation, a defense attorney needs to assess the range of possible trial and sentencing outcomes for his client in order to properly craft an effective defense strategy and evaluate the prospects for striking a beneficial plea bargain."); Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 Conn. L. Rev. 569, 576 (1998) (noting that a "defense attorney is more likely to favorably affect his client's sentence if he possesses," *inter alia*, "good lines of communication with his client").

> A defendant who enters . . . a [guilty] plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. . . . [B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.

McCarthy v. United States, 394 U.S. 459, 466 (1969) (citation and footnotes omitted). Thus, a child must weigh costs and benefits, understand the quantum of proof and caliber of evidence associated with particular charges and evaluate the long and short-term repercussions of all available options before deciding whether to go to trial or enter a guilty plea.

As discussed in Section I.C, *supra*, a child's capacity to fully engage in this critical evaluative process is greatly reduced, relative to that of an adult, because adolescents' ability to conduct reasoned deliberation regarding a plea offer may be diminished by their impulsive and reckless nature and limited temporal perspective that often focuses on immediate, rather than long-term, consequences.

A child's ability to thoroughly consider a plea bargain is also reduced by the simple fact that children possess significantly less practical knowledge and experience to inform their choices and understand the consequences of a guilty plea or trial than adults. Puritz, *supra*, at 474; Clarke, *supra* note 2, at 694 ("As a class, adolescents are likely to have less knowledge and experience to draw on in making de-

cisions than adults."). The values and experiences that drive a teenager's choices are grounded upon characteristics that are not as established or static as those of adults. Melinda Schmidt et al., *Effectiveness of Participation as a Defendant: The Attorney-Juvenile Client Relationship*, 21 Behav. Sci. Law 175, 179 (2003). Unlike an adult, the experiences, values, and priorities that a child will rely on in evaluating the desirability of a plea bargain are likely to change because teenagers are still in the process of maturation. Thus their decision-making is likely to be very different from that of an adult. Schmidt, *supra*, at 179-80.

The barriers of trust described in Section I.A, *supra*, also affect the attorney's ability to properly counsel a child about a plea offer. "A good lawyer tries to persuade his client to plead guilty when, in his or her professional opinion, a plea will produce a better outcome. . . . If the [child] client does not trust his lawyer, the client's instincts will tell him to fight the lawyer at every step. Representation, and likely the outcome, will suffer." Hoeffel, *supra*, at 542 (footnotes omitted); *see also* Scott, *Evolution*, *supra*, at 171 (footnotes omitted) (explaining that "[h]ow defendants respond to attorneys' advic and weigh the consequences of their choices in the trial process may be affected by psychosocial factors such as peer and adult influence, temporal perspective, and risk preference and perception," and these factors "might influence youths' judgments about the value of accepting plea bargains and of waiving important rights in the legal process").

Even in those instances when children heed their attorney's advice, the questionable reasoning and judgment a child may employ in reaching a decision to accept or reject a plea bargain is also a source for concern. The potential problem can manifest itself in one of two ways: (1) as discussed in Section I.A, *supra*, a child may reject, out of hand, an attorney's recommendation regarding a plea bargain because she is inclined to reject any advice offered by an adult or authority figure; or (2) the child may fail to take on the requisite directive role in the attorney-client relationship due to her socialization to let adults make decisions for her. *See* Scott, *Developmental Incompetence, supra*, at 824 (noting that in a recent study of psychosocial influences on adolescent decision-making regarding plea offers, "75% of the eleven- to thirteen-year-olds, 65% of the fourteen- to fifteen-year-olds, and 60% of the sixteen- to seventeen-year-olds recommended accepting the plea offer," compared to the "evenly divided" responses of young adults, thus suggesting "a much stronger tendency for adolescents than for young adults to make choices in compliance with the perceived desires of authority figures"); *see also* Grisso, *supra*, at 19 ("[T]he process of achieving autonomy and a sense of identity often takes the adolescent through phases in which others' values play a strong role in his or her choices. At times this will be manifested in extreme deference to others' judgments . . . , while at other times choices may be made primarily in opposition to others' preferences."). Whether a youth rebels against the judgment of adult actors, exercises a strict fidelity to the views of others, or acts in a way that combines or contradicts both of these methods of decision-making, children are forced to find an ap-

propriate balance between their own feelings of distrust in the system and reliance on counsel. In reaching this balance a young person often acts to her own detriment, ensuring that the ultimate result is an exceedingly complicated and often deficient relationship with counsel. *See generally* Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. and Hum. Behav. No. 4, 333, 357-361 (2003) (discussing influence of authority figures on adolescent decision-making).

At bottom, children facing the possibility of a life without parole sentence must engage in the daunting task of weighing a multitude of complex factors in order to reach a decision about a plea bargain that may have permanent and lifelong consequences. The compromised attorney/child-client relationship combined with the characteristics of youth and other factors yield a strong likelihood of error in this critical decision-making process. *See* Pinard, *supra*, note 11 at 1121 ("[G]iven the studies that have found both that juveniles do not understand the various phases of the criminal process and they cannot fully comprehend long-term consequences (or tend to ignore these consequences in favor of immediate consequences), serious questions should arise as to whether juveniles can adequately consider, weigh and understand these consequences when analyzing the merits of entering a guilty plea.").

For children subject to life without parole sentences, a faulty plea decision can result in a veritable death sentence with no hope for a life outside of prison.

IV. Compromised Attorney/Child-Client Relationships Can Contribute to Children Facing Inappropriately Harsh Prison Conditions.

For the reasons detailed above, a reduced capacity to develop and sustain a meaningful attorney/client relationship can play a critical role in inappropriate sentence outcomes. This concern is particularly salient in the context of extreme sentences where children may not only receive severe and permanent sentences that fail to accurately reflect culpability, but also where children, once sentenced, are likely face unique suffering in adult prison.[14] This circumstance further demonstrates the inappropriateness of juvenile life without parole sentencing.

"Adolescents in adult institutions have a relatively low and weak position in the social hierarchy of prison, and physical vulnerability to attack accompanies their low status." Jeffrey Fagan, *This Will Hurt Me More Than It Hurts You*, 16 Notre Dame J. L. Ethics & Pub. Pol'y 1, 22 (2002). Consequently, when compared to adults, children in the adult institutions are "eight times more likely to commit suicide, 500 times more likely to be sexually assaulted and 200 times more likely to be beaten by staff than adults." Amanda M. Kellar, *They're Just*

---

[14] A majority of states (31) house transferred youth offenders in adult correctional facilities. Bishop, *Juvenile Offenders*, *supra*, at 138. "Florida leads the nation in incarcerating children between the ages of thirteen and seventeen in adult prisons." Paolo G. Annino, *Children in Florida Adult Prisons: A Call for a Moratorium*, 28 Fla. St. U. L. Rev. 471, 471 (2001).

Kids: Does Incarcerating Juveniles With Adults Violate the Eighth Amendment?, 40 Suffolk U. L. Rev. 155, 171 (2006) (citing Jeffrey Fagan, *Juvenile Justice Policy and Law: Applying Recent Social Science Findings to Policy and Legislative Advocacy*, 183 PLI/Crim. 395, 407-08 (1999) (citing an American Bar Association study comparing violence juveniles face to violence adults face)). Unfortunately, traditional attempts to protect children in adult prison often fail because isolation in protective custody excludes the child from educational and other programming activities. Bishop, *Juvenile Offenders*, *supra*, at 146.

Thus, the adult "correctional setting becomes the environment for social development" during an adolescents' most "formative period of development," thereby "stunt[ing] the development of cognitive growth and psychosocial maturity . . . [and] likely exacerbat[ing] rather than ameliorat[ing] many of the very factors that lead juveniles to commit crimes in the first place (mental illness, difficulties in school or work, and . . . psychological immaturity)." Steinberg, *supra* note 2, at 478, 480.

While these problems affect children in adult prison regardless of their sentence, they take on a qualitative difference for those young people who have no hope of ever escaping the violence of their surroundings.

CONCLUSION

The characteristics of youth may always present a potential barrier to effective representation by counsel and contribute to unfair criminal justice outcomes. Given the severity and finality of juvenile life without parole sentencing, the ways in which compromised attorney/child-client relationships can contribute to unreliable sentencing outcomes supports the significant constitutional concerns raised by Petitioners and their other supporting *amici*. This Court should therefore conclude that life without parole sentences for offenders under age 18 at the time of their offense violates the Eighth Amendment.

Respectfully submitted,

JOHN PAYTON
Director-Counsel
DEBO P. ADEGBILE
CHRISTINA SWARNS
JIN HEE LEE
*VINCENT SOUTHERLAND
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
99 Hudson St., 16th Floor
New York, NY 10013
(212) 965-2200

* *Counsel of Record*

CHARLES J. OGLETREE, JR.
ROBERT J. SMITH
CHARLES HAMILTON HOUSTON

INSTITUTE FOR RACE &
JUSTICE
125 Mt. Auburn St., 3rd Floor
Cambridge, MA 02138

JEFFREY L. FISHER
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1660 L St., NW, 12th Floor
Washington, DC 20036

JULY 23, 2009

AMICUS CURIAE BRIEF

Nos. 08-7412, 08-7621

In the Supreme Court of the United States

TERRANCE TAMAR GRAHAM, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT

JOE HARRIS SULLIVAN, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF FOR THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

SCOTT BURNS
National District Attorneys Association
44 Canal Center Plaza
Alexandria, VA 22314
(703) 549-9222

GENE C. SCHAERR
Counsel of Record
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000

LINDA T. COBERLY
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600

CHRISTOPHER J. PAOLELLA
Winston & Strawn LLP
200 Park Avenue
New York, NY 10016
(212) 294-6700

Counsel for Amicus Curiae

QUESTION PRESENTED

Does the Eighth Amendment's prohibition of "cruel and unusual punishments" bar sentencing violent juvenile offenders to life without parole?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION AND INTEREST OF *AMICUS CURIAE* 1

STATEMENT 3

SUMMARY OF ARGUMENT 6

I. The Eighth Amendment Does Not Categorically Bar The Imposition Of A Sentence Of Life Without Parole For All Juvenile Offenders. 8

A. To succeed in their facial challenge, petitioners must show that there is no set of circumstances under which a life-without-parole sentence would be constitutionally valid against a juvenile. 8

B. Outside the capital punishment context, this Court has never categorically exempted an entire class of offenders from a particular punishment. 11

C. This Court's gross proportionality principle for non-capital sentences requires individual comparison, not categorical treatment 13

D. The infrequency with which life without parole is imposed upon juvenile offenders demonstrates that this punishment is only being sought and imposed in the most severe cases. 18

II. Graham's And Sullivan's Sentences Are Not Grossly Disproportionate, And Their Cases Illustrate The Folly Of A Categorical Prohibition On Life Sentences For Juveniles 19

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Atkins v. *Virginia*,
536 U.S. 304 (2002) 11-12

Baze v. *Rees*,
128 S. Ct. 1520 (2008) 22

Ewing v. *California*,
538 U.S. 11 (2003) 13, 15, 21

Furman v. *Georgia*,
408 U.S. 238 (1972) 12

Gregg v. *Georgia*,
428 U.S. 153 (1976) 11

Harmelin v. *Michigan*,
501 U.S. 957 (1991) 2, 13-15

Hutto v. *Davis*,
454 U.S. 370 (1982) 13

Kennedy v. *Mendoza-Martin*,
372 U.S. 144 (1963) 23

Lockett v. *Ohio*,
438 U.S. 586 (1978) 12

Lockyer v. *Andrade*,
538 U.S. 63 (2003) 7, 13

Naovarath v. *State*,
779 P.2d 944 (Nev. 1989) 17

O'Dell v. *Netherland*,
521 U.S. 151 (1997) 21

Parke v. *Raley*,
506 U.S. 20 (1992) 15

Penry v. *Lynaugh*,
492 U.S. 302 (1989) 16

People v. *Dillon*,
668 P.2d 697 (Cal. 1983) 17

People v. *Miller*,
781 N.E.2d 300 (Ill. 2002) 16-17

Phillips v. *State*,
807 So. 2d 713 (Fla. App. 2002) 17

Pittman v. South Carolina,
647 S.E.2d 144 (S.C. 2007) 23

Ring v. *Arizona*,
536 U.S. 584 (2002) 11, 22

Roper v. *Simmons*,
543 U.S. 551 (2005) ..... *passim*

Rummel v. *Estelle*,
445 U.S. 263 (1980) 2, 12, 15

Schall v. *Martin*,
467 U.S. 253 (1984) 10

Simmons v. *South Carolina*,
512 U.S. 154 (1994) 22

Solem v. *Helm*,
463 U.S. 277 (1983) 14, 21

Spaziano v. *Florida*,
468 U.S. 447 (1984) 12

Stanford v. *Kentucky*,
492 U.S. 361 (1988) 14, 16, 18

Thompson v. *Oklahoma*,
487 U.S. 815 (1988) 11

United States v. *Salerno*,
481 U.S. 739 (1987) 7, 9-10

Woodson v. *North Carolina*,
428 U.S. 280 (1976) 13

STATUTES

18 U.S.C. § 3141(e) (1982 & Supp. III 1993) 10

Fla. Stat. § 985.557 (2007)..... 18-19

Fla. Stat. § 985.565 (2007)..... 19

OTHER AUTHORITIES

Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049 (2004) 14

U.S. Const., amend. i 9

U.S. Const., amend. viii ..... *passim*

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

Sentencing a juvenile to life imprisonment without the possibility of parole is a weighty matter. Prosecutors do not seek such punishment lightly, nor do courts impose it without careful consideration and compelling reasons. But youthful offenders sometimes commit heinous crimes—rapes, kidnappings, and violent robberies and assaults that may leave the victim maimed for life, or worse. Many do so with full knowledge of the wrongfulness of their actions, and with callous disregard of both the demands of the law and the rights of their victims. And many are already repeat offenders with histories of recidivism. Such offenses cannot be chalked up to "youthful indiscretion." It is in these rare and tragic cases of heinous crimes committed by already-hardened and violent juvenile offenders that a State can and must be allowed to impose the severe sanction of life imprisonment without parole.

The crimes committed by juveniles, like those committed by adults, vary in severity. And individual juvenile offenders, like adult criminals, have different levels of maturity, culpability, and potential for rehabilitation. But petitioners would have this Court impose a categorical rule that the imposition of a life sentence without parole on a juvenile is *always* "cruel and unusual punishment"—regardless of the

---

[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part. No person or entity, other than the *amicus* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. NDAA is filing its brief with the consent of all parties. Letters of consent have been lodged with the Court.

nature and severity of the crime, the individual defendant's maturity and criminal history, or the procedural safeguards the State has put in place to avoid grossly disproportionate sentences.

This one-size-fits-all approach is not mandated by the Constitution. Indeed, it runs squarely afoul of this Court's holding that for non-capital punishments, the Eighth Amendment "forbids only extreme sentences that are 'grossly disproportionate'" to the individual crime. *Harmelin* v. *Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment). As the Court has recognized, such cases are "exceedingly rare." *Rummel* v. *Estelle*, 445 U.S. 263, 272 (1980). To proportionately punish the guilty, adequately protect the public, and deter future crimes, prosecutors and judges must have the flexibility to ensure that violent crimes committed by the most dangerous juvenile offenders may be met with an appropriately severe sanction—one that, in their best judgment, protects society from further depredation at the hands of those who, young as they may be, have already demonstrated that they pose a severe risk to those around them.

Amicus National District Attorney's Association (NDAA) has an obvious, powerful interest in this Court's resolution of the question presented. NDAA is the oldest and largest professional organization representing U.S. criminal prosecutors. Its members are state and local prosecutors who, in the exercise of their prosecutorial discretion, bear the heavy burden of deciding whether to seek the most severe possible sanctions against juvenile offenders—including life imprisonment without parole—when the circumstances so warrant. The relative rarity of juvenile life-without-parole sentences is a testament that this

responsibility is not discharged lightly. Prosecutors (and courts) recognize that life without parole is a severe sanction that should be imposed on a youthful offender only in extreme circumstances, and as a consequence, the penalty is rarely imposed. But that does not mean that the Constitution bars such punishment on those rare occasions when it is necessary to protect society.

STATEMENT

These cases concern two recidivist juvenile offenders who were convicted of violent felonies and sentenced to life imprisonment without parole.

1. Petitioner Joe Harris Sullivan was thirteen years old when he was convicted of sexual battery and burglary of a dwelling in a Florida state court. Sullivan and two accomplices broke into the then-unoccupied home of an elderly woman and stole jewelry and coins. Later the same day, Sullivan and an accomplice returned to the home, which was now occupied. When the 72-year-old victim attempted to prevent Sullivan from entering her home, he forced his way in and threw a black slip over her head. Sullivan took her to the bedroom where he stripped her, beat her, and brutally raped and sodomized her. Sullivan threatened to kill the victim several times, but stated that if she couldn't identify him, he "might not have to kill her." As a result of the rape, the victim sustained bruising, a laceration to the vulva, and a vaginal tear that required surgery to repair. A police officer who was called to the scene by a neighbor saw Sullivan fleeing the house immediately after the rape.

Sullivan was arrested, tried, and convicted. At sentencing, the trial court was confronted with Sulli-

van's extensive prior criminal record. In the two years before his conviction, Sullivan had been found guilty of seventeen criminal offenses comprising several serious felonies (including an assault on his juvenile counselor and a prior burglary during which Sullivan killed a dog). Based on this prior record, Sullivan far exceeded the predicate needed under Florida's sentencing guidelines to impose a life sentence. The court found that, in light of these facts and the nature of the crimes, an adult sentence was appropriate. It sentenced Sullivan to life imprisonment on the sexual battery charges and to 30 years' imprisonment (later reduced to 15 years) on the burglaries.

More than 15 years after his conviction and sentencing, Sullivan filed a state post-conviction motion, arguing that this Court's decision in *Roper* v. *Simmons*, 543 U.S. 551 (2005), had created a new constitutional right that entitled him to relief from his sentence. The trial court dismissed the motion as untimely, and the Florida District Court of Appeal affirmed.

2. Petitioner Terrence Jamar Graham was sixteen years old when he and an accomplice entered a restaurant while wearing masks and demanded that the restaurant manager give them money. When the manager refused, Graham's accomplice hit him in the head twice with a steel bar. Graham and his accomplice then fled the scene.

Graham was arrested and confessed to the crime. He was charged with attempted robbery and burglary with an assault or battery, which carried a maximum sentence of life imprisonment without parole. After a hearing, he was certified to be tried as an adult.

Graham pleaded guilty to both offenses. The court withheld adjudication and sentenced Graham to 12 months in jail and three years of probation. During his plea colloquy, Graham acknowledged that he was being sentenced as an adult and waived his right to have the court consider the imposition of juvenile sanctions. He was certified as an adult for any future criminal violations.

While on probation, Graham—who was seventeen years old by this time—was arrested on new charges of home-invasion robbery and fleeing and eluding the police. Graham and his accomplices had robbed the homeowner at gunpoint; Graham himself held a cocked gun to the victim's head while he and his accomplices entered the home and demanded money from the occupants. They stole a gold crucifix from another occupant of the home and barricaded both victims in a closet before leaving the scene. Graham was apprehended after a high-speed automobile chase. After his arrest, Graham told police that he had been involved in "[t]wo or three" other robberies before the home invasion. He also admitted fleeing and attempting to elude a law enforcement officer.

A Florida court found that Graham had violated the conditions of his probation by possessing a weapon, committing the home-invasion robbery, and fleeing from police. The court, finding that further juvenile sanctions would not be appropriate, sentenced Graham to life imprisonment without possibility of parole. The court concluded that "this is an escalating pattern of criminal conduct * * * and that we can't help you any further. We can't do anything to deter you. * * * Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your

life and that the only thing I can do now is to try to protect the community from your actions." Graham Pet. App. 3–4. Graham was nineteen at the time of sentencing.

Graham appealed, arguing that his sentence was cruel and unusual punishment under the Florida and U.S. Constitutions. The Florida District Court of Appeals rejected Graham's facial challenge, holding that this Court's decision in *Roper* did not establish that sentencing a juvenile to life imprisonment is cruel and unusual in all situations. It also rejected Graham's challenge that the sentence was grossly disproportionate as applied to him. The court took into account that "after being placed on probation—an extremely lenient sentence for the commission of a life felony—[Graham] committed at least two armed robberies and confessed to the commission of an additional three." Graham Pet. App. 17. The court noted the violent nature of the offenses, and recognized that the "offenses were not committed by a pre-teen, but a seventeen-year-old." *Ibid.* Based on these individualized circumstances, the Florida court held that Graham's sentence was not grossly disproportionate.

SUMMARY OF ARGUMENT

Petitioners would have this Court categorically declare unconstitutional the imposition of a sentence of life without parole on any juvenile offender, regardless of the severity of the crime, the individual offender's maturity and culpability, and the juvenile's criminal history. Essentially, they are asserting a facial challenge against the application of this punishment to juveniles as a class.

As we demonstrate below in Part I, petitioners' approach is foreclosed by this Court's holding that a

law may not be declared facially unconstitutional unless there is no set of circumstances under which the challenged law would be valid. See *United States* v. *Salerno*, 481 U.S. 739 (1987). Here, petitioners bear the burden of showing that there is no case in which the imposition of a life-without-parole sentence would be constitutionally valid against a juvenile. They cannot carry this burden.

Petitioners' reliance on the categorical exclusions set forth in *Roper* v. *Simmons*, 543 U.S. 551 (2005), is inapposite. *Roper* was a death penalty case and, as this Court has held time and again, "death is different." Given both the irrevocability and the ultimate severity of the death penalty, its imposition implicates prophylactic rules that do not apply to sentences of imprisonment—even imprisonment for life. Outside of capital punishment, this Court has *never* exempted a whole class of offenders from a particular category of punishment on the ground that it would be cruel and unusual. Because life imprisonment does not raise the same issues as a sentence of death, the Court should decline petitioners' invitation to do so now.

Rather, this Court should apply its long-standing and well-established methodology for judging the constitutionality of a prison term: whether the sentence is "grossly disproportionate" to the individual crime. See *Lockyer* v. *Andrade*, 538 U.S. 63, 72 (2003). This methodology shuns categorical distinctions; rather, it looks to case-specific factors like the severity of the crime and the offender's criminal history. While a court reviewing the proportionality of a non-capital sentence is under no constitutional obligation to take into consideration mitigating factors like the offender's age, if youth has any place in the

calculus, it is as one of many factors to be weighed, not as the source of an independently determinative bright-line rule.

Applying these principles to Graham's and Sullivan's sentences, it is clear, as we show in Part II, that the imposition of life without parole was not grossly disproportionate in those cases. Both petitioners engaged in serious crimes of violence that posed a great threat to public safety. Each had a long record of prior offenses that suggested that rehabilitation was not an option. And each continued to commit violent crimes after receiving relatively lenient treatment for their prior offenses. Under these circumstances, a sentence of life without parole is not cruel and unusual punishment. And Graham's and Sullivan's cases well illustrate the wisdom of *avoiding* the categorical bar they seek.

I. The Eighth Amendment Does Not Categorically Bar The Imposition Of A Sentence Of Life Without Parole For All Juvenile Offenders.

A. To succeed in their facial challenge, petitioners must show that there is no set of circumstances under which a life- without-parole sentence would be constitutionally valid against a juvenile.

As noted, petitioners do not merely argue that the imposition of a life sentence without parole was grossly disproportionate *in their particular cases.* Rather, they ask this Court to rule categorically that such a sentence is *always* cruel and unusual when imposed on a juvenile—regardless of the nature of the crime, the age and maturity of the offender, the

offender's prior criminal history, or the individualized determinations made by the sentencing court.[2] This argument runs counter to both this Court's jurisprudence about facial challenges and its general Eighth Amendment precedent, which holds that a punishment must be "grossly disproportionate" to the specific offense in order to be deemed "cruel and unusual."

To mount a successful facial challenge outside of the First Amendment context, a petitioner "must establish that no set of circumstances exists under which the [challenged law] would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). The fact that a statute "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Ibid.*

Salerno is illustrative. The petitioner there argued that the federal Bail Reform Act was facially unconstitutional under both the Due Process Clause and the Excessive Bail Clause of the Eighth Amendment, because it permitted pretrial detention without bail upon a judicial officer's determination that alter-

---

[2] See Graham Br. 32 ("juvenile defendants *as a class* possess certain characteristics, in particular diminished culpability and capacity for change, that render unconstitutional their sentences") (emphasis added); *ibid.* at 36 ("no contemporaneous sentencing procedure, even those related to Graham's individual characteristics, could make the sentence imposed constitutional"); *ibid.* at 50 ("[H]ere, this Court should categorically reject the proposition that the Eighth Amendment permits a sentencing judge to determine, on a case-by-case basis, when a life-without-parole sentence is appropriate for a juvenile offender who commits a non-homicide."); Sullivan Br. 57 ("a categorical rule barring the infliction of a life-without-parole sentence on any offender under a certain age is necessary").

native procedures would not "reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3141(e) (1982 & Supp. III 1993); see also *Salerno*, 481 U.S. at 745. The Court disagreed, concluding that "whether or not [the procedures of the Act] might be insufficient in some particular circumstances," they survived facial challenge because they were "'adequate to authorize the pretrial detention of at least some [persons] charged with crimes.'" *Ibid.* at 751 (quoting *Schall* v. *Martin*, 467 U.S. 253, 264 (1984)).

Petitioners here do not challenge the constitutionality of statutes authorizing the imposition of a life sentence without parole in all circumstances; they do not, for example, challenge the constitutionality of such a statute as applied to adults. But they do seek a categorical ruling that such laws are always unconstitutional as applied to juveniles, regardless of circumstances.[3] To succeed in such a limited facial challenge under *Salerno*, petitioners must show that there is no set of circumstances under which imposition of a life-without-parole sentence would be constitutionally valid against a juvenile.

---

[3] Graham contends that imposition of a life-without-parole sentence is always unconstitutional for an offense committed when the offender was younger than eighteen. Graham Br. 32. Sullivan argues that such sentences are categorically unconstitutional for "any offender under a certain age," and leaves it to the Court to draw that line somewhere between fourteen and eighteen. Sullivan Br. 58–61.

B. Outside the capital punishment context, this Court has never categorically exempted an entire class of offenders from a particular punishment.

Petitioners cannot meet this burden. Outside the death penalty context, this Court's Eighth Amendment jurisprudence holds that a sentence of imprisonment may be found unconstitutional only if it is "grossly disproportionate" to the specific offense. In making this determination, this Court has weighed factors like the severity and violence of the offense and the culpability and criminal history of the offender. The question of whether a sentence is grossly disproportionate is thus an inherently individualized and fact-specific inquiry that does not permit of categorical treatment.

Indeed, outside the death penalty context, this Court has never exempted a whole class of offenders from a specific punishment on the ground that its imposition would be categorically cruel and unusual. The only such categorical rulings have dealt solely with capital punishment. See *Thompson* v. *Oklahoma*, 487 U.S. 815 (1988) (plurality opinion) (holding that Eighth Amendment prohibits execution of persons under 16 years of age at the time of the offense); *Atkins* v. *Virginia*, 536 U.S. 304 (2002) (same for mentally retarded persons); *Roper*, *supra* (same for persons under 18 years of age at the time of the offense).

The reason for these extraordinary exemptions is clear: As this Court has stated time and again, "[d]eath is different." *Ring* v. *Arizona*, 536 U.S. 584, 605–606 (2002) (citation omitted). See also, *e.g.*, *Gregg* v. *Georgia*, 428 U.S. 153, 188 (1976) (joint

opinion of Stewart, Powell, and Stevens, JJ.) (noting that the "penalty of death is different in kind from any other punishment" and emphasizing its "uniqueness"); *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (death penalty is "qualitatively different" from other punishments); *Spaziano* v. *Florida*, 468 U.S. 447, 459 (1984) (citing Court's prior recognition of the "'qualitative difference' of the death penalty"). First, the finality of execution—unlike even the most severe sentence of imprisonment—makes the consequences of error irrevocable and irreversible. See *Rummel*, 445 U.S. at 272 ("The penalty of death * * * * is unique in its total irrevocability.") (quoting *Furman* v. *Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring)); *Furman*, 408 U.S. at 290 (Brennan, J., concurring) (the "finality of death precludes relief"). And second, the death penalty is "uniqu[e] * * * [in] its extreme severity"; it is the "ultimate sanction." *Furman*, 408 U.S. at 286–290 (Brennan, J., concurring).

Given the death penalty's unique severity and irrevocability, the Court has decreed that it must be reserved for those whose "extreme culpability makes them 'the most deserving of execution.'" *Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319). It is these unique concerns that underlie the categorical prophylactic rules announced in cases like *Atkins* and *Roper*. The *Roper* Court itself affirmed a life sentence without possibility of parole for a conviction based on juvenile conduct. *Roper*, 543 U.S. at 578–579.

These unique considerations that capital punishment invokes simply do not apply to prison terms, even life without parole. This Court has long recognized that the "penalty of death is qualitatively different from a sentence of imprisonment, however

long." *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). Indeed, "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Ibid.*

C. This Court's gross proportionality principle for non-capital sentences requires individual comparison, not categorical treatment.

Although this Court's non-capital Eighth Amendment jurisprudence has not always been pellucid, "one governing legal principle emerges as 'clearly established' * * * * A gross disproportionality principle is applicable to sentences for terms of years." *Lockyer* v. *Andrade*, 538 U.S. 63, 72 (2003); see also *Ewing* v. *California*, 538 U.S. 11, 20 (2003) ("The Eighth Amendment * * * contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'") (quoting *Harmelin*, 501 U.S. at 996–997 (Kennedy, J., concurring in part and concurring in the judgment)). Although "the precise contours of [this principle] are unclear," the Court has emphasized that it is "applicable only in the 'exceedingly rare' and 'extreme' case." *Lockyer*, 538 U.S. at 73 (quoting *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment)); see also *Ewing*, 538 U.S. at 21 ("federal courts should be reluctant to review legislatively mandated terms of imprisonment, and * * * successful challenges to the proportionality of particular sentences should be exceedingly rare") (quoting *Hutto* v. *Davis*, 454 U.S. 370, 374 (1982) (*per curiam*)).

In conducting proportionality review, this Court compares the nature and severity of the offense with

the sentence. That is, it evaluates the "nexus between the punishment imposed and the defendant's blameworthiness" to ensure that they are proportional. *Stanford* v. *Kentucky*, 492 U.S. 361, 382 (1988) (O'Connor, J., concurring in part and concurring in the judgment). Such review is lenient and deferential, guided as it is by the principles of "the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors." *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment).

Because proportionality review requires a court both to defer to legislative policy determinations and to evaluate the nexus between a *particular* crime and a *particular* sentence, it cannot support the kind of categorical facial attack that petitioners mount here. Indeed, this Court has already held that violent crimes may support harsher sentences than nonviolent offenses. See *Solem* v. *Helm*, 463 U.S. 277, 292–293 (1983) ("nonviolent crimes are less serious than crimes marked by violence or the threat of violence"); *ibid.* at 296 (holding life sentence without parole for issuing a bad check unconstitutional because offense was "one of the most passive felonies a person could commit").[4]

The lack of direct violence need not, however, invalidate a severe sentence where the crime otherwise

---

[4] It is significant that *Solem*, which involved a passive and nonviolent financial fraud offense, is the *only* case in which this Court has invalidated a prison sentence as disproportionate. See Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1058 (2004).

poses a serious threat to society. *See Ewing*, 538 U.S. at 28 (holding that non-violent theft of golf clubs valued at $1,200 supported sentence of life imprisonment with no chance of parole for 50 years); *Harmelin*, 501 U.S. at 1002–1003 (Kennedy, J., concurring in part and concurring in the judgment) (upholding sentence of life imprisonment for cocaine possession based on the "direct nexus between illegal drugs and crimes of violence"). Petitioners' categorical approach asks the Court to ignore this precedent and to declare *all* life-without-parole sentences unconstitutional for juvenile offenders—with no consideration of how serious or horrifically violent the offense may have been.

This Court has also looked to the offender's criminal history in judging proportionality. Because "'[s]tates have a valid interest in deterring and segregating habitual criminals' * * * * [r]ecidivism has long been recognized as a legitimate basis for increased punishment." *Ewing*, 538 U.S. at 25 (quoting *Parke* v. *Raley*, 506 U.S. 20, 27 (1992)). Thus, proportionality review must take into account "the interest, expressed in all recidivist statutes, in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *Rummel*, 445 U.S. at 276 (upholding life sentence for third nonviolent fraud felony, where amounts at issue were $80, $23.36, and $120.75). Petitioners' categorical rule again ignores this long-standing precedent and would preclude any consideration of a juvenile's criminal history in evaluating the proportionality of a sentence of life without parole.

Relying heavily on *dicta* from *Roper*, petitioners nevertheless argue that juvenile offenders should be exempt from this Court's well-established proportionality standard because they are categorically less culpable than adults. But even if *some* juveniles may demonstrate an underdeveloped sense of responsibility or impulse control that renders them somewhat less culpable, or may be somewhat less amenable to the deterrent effect of the criminal law, that does not mean that there is *no* juvenile offense severe enough to support the imposition of life without parole. See *Stanford*, 492 U.S. at 378 ("it is not demonstrable that no 16-year-old is 'adequately responsible' or significantly deterred"). In deciding how to charge and sentence such offenders, prosecutors and courts properly take into account factors like criminal culpability. And in appropriate circumstances, so may appellate courts determining whether a particular sentence (including life without parole) is grossly disproportionate.[5]

But those same courts should also be able to take into account the other well-established factors—like severity, violence, and criminal history—that *also* bear on an offender's culpability.[6] While it may be

---

[5] Unlike in the death penalty context, there is no constitutional requirement that a court conducting non-capital proportionality review take into account all mitigating factors, such as age. Compare *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) (capital jury must be empowered to consider and give effect to all mitigating evidence). However, such factors may sometimes be relevant in judging the offender's culpability.

[6] The state court cases cited by petitioners involve precisely this type of fact-specific inquiry; they do not purport to apply a categorical rule against the imposition of life without parole on *all* juvenile offenders. In *People* v. *Miller*, 781 N.E.2d 300 (Ill. 2002), for example, the Illinois Supreme Court held that the im-

that "it is statistically aberrant for boys to refrain from minor criminal behavior" during adolescence, see Sullivan Br. 21, it is equally clear that the vast majority of juveniles can and do refrain from committing *repeated and serious violent felonies*—like rape and aggravated burglary. That a juvenile commits such acts says as much about his or her culpability as does chronological age.

Of course, not every juvenile offender is "irretrievably depraved or permanently flawed." Sullivan Br. 24. But a small number may be, and in those rare cases, a State should not be categorically prohib-

---

position of life without parole on a 15-year-old who acted, without premeditation, as a passive lookout during murders violated state constitution's proportionate penalties clause. But it made clear that it could contemplate other situations where "a sentence of natural life imprisonment without the possibility of parole [would be] appropriate" for a more culpable juvenile offender. *Ibid.* at 309.

Similarly, in *Naovarath* v. *State*, 779 P.2d 944, 946 (Nev. 1989), the Nevada Supreme Court invalidated a life sentence imposed on a 13-year-old convicted of killing a man who had repeatedly molested him, but noted that "[w]hen a child reaches twelve or thirteen, it may not be universally agreed that a life sentence without parole should never be imposed." And in *People* v. *Dillon*, 668 P.2d 697, 726–727 (Cal. 1983), the California court overturned the imposition of a life-without-parole sentence on a minor convicted of felony murder only after a fact-specific inquiry in which it concluded that the offender was an "unusually immature youth" who "had had no prior trouble with the law" and "was not the prototype of a hardened criminal who poses a grave threat to society." See also *Phillips* v. *State*, 807 So. 2d 713, 718 (Fla. App. 2002) (upholding juvenile sentence of life without parole, but only after considering offender's age as part of proportionality determination: "[A]lthough Mr. Phillips' culpability may be diminished somewhat because of his age at the time of the commission of the crime, the factor of his age is outweighed by his heinous conduct and the ultimate harm—death—that he inflicted upon his victim.")

ited from imposing a proportionate punishment that fits the crime. Petitioners' facial challenge should be rejected.

D. The infrequency with which life without parole is imposed upon juvenile offenders demonstrates that this punishment is only being sought and imposed in the most severe cases.

Petitioners correctly note that the imposition of life without parole on juveniles is rare. But this does not mean that such sentences are cruel and unusual. To the contrary, it suggests that the most severe sentences are being reserved for the most horrific crimes and the most hardened and dangerous juvenile offenders. This is an argument not against, but in favor of, the proportionality of the penalty in those exceptional cases.

There is no question that sentencing a juvenile to life imprisonment without parole is a weighty decision. Indeed, "[t]he very considerations which induce petitioners and their supporters to believe that [such a sentence] should never be imposed on offenders under 18 cause prosecutors and juries to believe that it should rarely be imposed." *Stanford*, 492 U.S. at 374. To ensure that such a severe penalty is not imposed except in appropriate circumstances, States channel prosecutorial discretion and judicial determinations through procedures which introduce multiple checks into the process of juvenile sentencing.

In Florida, for example, the initial decision as to whether to prosecute a juvenile as an adult typically rests in the hands of the prosecutor, but is guided by statutory requirements. See Fla. Stat. § 985.557 (2007). A prosecutor may charge any 16- or 17-year

old as an adult if, in his or her judgment and discretion, "the public interest requires that adult sanctions be considered or imposed." *Ibid.* § 985.557(1)(b). But a prosecutor may charge a 14- or 15-year-old as an adult only for certain enumerated violent felonies. *Ibid.* at § 985.557(1)(a). These requirements ensure that adult penalties will only be sought in cases involving the most mature offenders and most serious violent crimes.

Even after a juvenile is prosecuted and convicted as an adult, he or she may still be sentenced as a juvenile based on various factors, including the seriousness and violence of the offense; the offender's sophistication and maturity; the offender's criminal history; and the prospects of reasonable deterrence and rehabilitation. *Ibid.* at § 985.565(1)(b) (2007). It is thus only if both the prosecutor *and* the court decide, in the exercise of their discretion, that the circumstances do not warrant juvenile sentencing that a juvenile in Florida will be sentenced as an adult.

Given these procedural safeguards, it is unsurprising that it is rare for a juvenile to receive an adult sentence of life without parole—even in Florida, the State where such sentences are the most common. This rarity simply confirms that prosecutors and courts have used their guided discretion to confine application of this severe sanction to the most severe offenses and hardened juvenile offenders.

II. Graham's And Sullivan's Sentences Are Not Grossly Disproportionate, And Their Cases Illustrate The Folly Of A Categorical Prohibition On Life Sentences For Juveniles.

The facts underlying petitioners' own sentences demonstrate that imposition of life without parole

has been confined to rare and deserving cases. Applying the principles announced by this Court to their individual offenses, neither Graham's nor Sullivan's sentence is grossly disproportionate—and the facts of their cases illustrate the absurdity of the categorical rule they seek in this Court.

1. As noted, Graham was convicted of armed burglary, a violent felony, which he committed at age sixteen. In the course of that burglary, Graham's accomplice beat the victim on the head with a steel bar. Graham received a lenient sentence of 12 months in county jail plus probation—in part by voluntarily waiving his right to be sentenced as a juvenile if he committed future offenses. Given a second chance by the courts, Graham promptly violated his probation by committing (at age seventeen) another violent robbery and burglary: a home invasion during which he held a cocked gun to the victim's head. He also confessed to having committed several other burglaries for which he was not formally charged.

While Sullivan was only thirteen when he committed his principal offenses, the details of those crimes are shocking in their violence and brutality. After burglarizing an unoccupied house, he later returned to the house and brutally raped and sodomized its elderly occupant, while beating her and repeatedly threatening to kill her. Sullivan's sexual assault was so violent that the victim suffered vaginal tears requiring surgery to repair.

Even at his young age, moreover, Sullivan was already a serial recidivist. At the time of his sentencing on the sexual assault and burglary charges, he had committed *seventeen* prior serious felonies, including burglary. He had also proven himself una-

menable to juvenile rehabilitation, having seriously assaulted one of his juvenile counselors.

Both Graham's and Sullivan's sentences were predicated on "crimes marked by violence or the threat of violence"—a factor that weighs heavily in the proportionality calculus. *Solem*, 463 U.S. at 292–293. Moreover, both Graham and Sullivan were violent recidivists. As the Florida Court of Appeals noted, these facts were "record evidence to support [Graham's] inability to rehabilitate." Graham Pet. App. 18.

Sullivan's record of prior offenses was even lengthier—with 17 prior serious felonies, most of them violent. Under these circumstances, the State's "'valid interest in deterring and segregating habitual criminals'" provides a "legitimate basis for increased punishment." *Ewing*, 538 U.S. at 25 (citation omitted).

Based on the well-established factors that this Court has traditionally weighed in determining the proportionality of a sentence, Graham's and Sullivan's sentences are not grossly disproportionate.

2. More important for present purposes, the facts of these two cases compellingly show the folly of any *per se* prohibition on life sentences for juvenile offenders. One of the reasons this Court has found it acceptable to limit the death penalty—and to categorically preclude it in certain kinds of cases—is that such limitations do not necessarily increase the risk to society when the alternative of life without parole is available. See, *e.g.*, *Roper*, 543 U.S. at 572 ("To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of

parole is itself a severe sanction, in particular for a young person."); *O'Dell* v. *Netherland*, 521 U.S. 151, 158 (1997) ("a prosecutor's future dangerousness argument will 'necessarily [be] undercut' by 'the fact that the alternative sentence to death is life without parole.'") (quoting *Simmons* v. *South Carolina*, 512 U.S. 154, 169 (1994) (plurality op.)); *Baze* v. *Rees*, 128 S. Ct. 1520, 1547 (2008) (Stevens, J., concurring) ("the recent rise in statutes providing for life imprisonment without the possibility of parole demonstrates that incapacitation is neither a necessary nor a sufficient justification for the death penalty"); *Ring*, 536 U.S. at 615 (Breyer, J., concurring) ("As to incapacitation, few offenders sentenced to life without parole (as an alternative to death) commit further crimes."). But that is only because, until now, governments have been free to incarcerate *permanently* the most violent offenders.

If this Court were to adopt the categorical rule urged by petitioners, however, federal and state governments would no longer have that option. They would be forced, under the banner of the Eighth Amendment, to unleash on society people they sincerely and reasonably believe to pose an enormous and unacceptable risk.

Indeed, the combination of *Roper* and a categorical rule against life without parole for juveniles would mean that all governments would be required, at some point, to send even hardened murderers back into society if they were juveniles at the time of their crimes.[7] Invoking the Eighth Amendment to prevent

---

[7] Petitioners seek to carve out those who commit homicide from their proposed categorical rule, but provide no justification whatsoever for this exclusion. Even if it can avoid the question

the execution of such offenders is one thing; invoking it to *guarantee* that they will eventually be sent back into society is quite another. Indeed, it is unfortunately not an overstatement to say that, if the Court were to adopt petitioners' proposed rule—even if it excluded convicted murderers—*some* citizens, somewhere, would eventually be murdered as a result. And countless others would suffer lesser injuries.

Nothing in the Eighth Amendment or this Court's case law can reasonably be read to require that result. Life without parole for a juvenile may well be "unusual"—indeed, it is, and it *should* be. But permanent incarceration for the most violent, hardened juvenile offenders is by no means "cruel"—especially by comparison to the harm such offenders could inflict on the public if the Eighth Amendment were construed, categorically, to require that they eventually be released into the general population. "The Constitution is not a suicide pact." *Kennedy* v. *Mendoza-Martin*, 372 U.S. 144, 160 (1963).

CONCLUSION

Petitioners offer no compelling argument to support a categorical rule prohibiting the imposition of life without parole upon juvenile offenders as a class. Rather, under this Court's precedents, courts must apply a test of gross proportionality based on the in-

---

in these cases, this Court, if it rules in petitioners' favor, will at some point have to decide why the same protection should not be extended to juvenile murderers. See, *e.g.*, *Pittman* v. *South Carolina*, 647 S.E.2d 144 (S.C. 2007), cert. denied, 128 S. Ct. 1872 (2008) (challenging 30-year sentence for murder committed by 12-year-old as cruel and unusual under *Roper*). And it is far from obvious why the principles that petitioners espouse, if accepted by the Court, would not apply in murder cases as well.

dividual circumstances surrounding the offense. Under this test, neither Graham's nor Sullivan's sentence was grossly disproportionate. And governments cannot reasonably be required, under the banner of the Eighth Amendment, to release into the general population offenders like Graham and Sullivan—much less hardened murderers who escape execution only because of *Roper*—simply because, at the time of their offenses, they happened to have been born a bit later than some arbitrarily selected date.

For all these reasons, the Court should affirm the decisions of the Florida courts.

Respectfully submitted,

SCOTT BURNS
National District Attorneys Association
44 Canal Center Plaza
Alexandria, VA 22314
(703) 549-9222

GENE C. SCHAERR
Counsel of Record
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000

LINDA T. COBERLY
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600

CHRISTOPHER J. PAOLELLA
Winston & Strawn LLP
200 Park Avenue
New York, NY 10016
(212) 294-6700

Counsel for Amicus Curiae

SEPTEMBER 21, 2009

AMICUS CURIAE BRIEF

Nos. 08-7412 and 08-7621

In The Supreme Court of the United States

TERRANCE JAMAR GRAHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

JOE HARRIS SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writs Of Certiorari To The District Court Of Appeal Of Florida, First District

BRIEF *AMICI CURIAE* OF NATIONAL ORGANIZATION OF VICTIMS OF JUVENILE LIFERS IN SUPPORT OF RESPONDENT

SHANNON LEE GOESSLING
Counsel of Record
SOUTHEASTERN LEGAL FOUNDATION
6100 Lake Forrest Drive, N.W.
Suite 520
Atlanta, Georgia 30328
(404) 257-9667

Attorney for Amici Curiae

September 21, 2009

[Additional *Amici* Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342 2831

Victims for Justice
Victims of Crime Amendment
National Organization of Victim Assistance
National Coalition of Victims In Action
Families and Friends of Violent Crime Victims
National Organization of Parents of Murdered Children
Central Minnesota Chapter of POMC
Greater Cincinnati Area Chapter of POMC
Houston, Texas Chapter of POMC
Northwestern Pennsylvania Chapter of POMC
Southwest Louisiana Chapter of POMC
Utah Chapter of POMC
Association of Prosecuting Attorneys
The Ben Doran Foundation
Survivors In Action
Citizens Against Homicide
Justice For All
Crime Victims Action Alliance
Arizona Voice for Crime Victims
Worldwide Sensible Sentencing Organization
Witness Justice
Crime Victims United of California
Crime Victims United of Oregon
Crime Victims United of Texas
IllinoisVictims.org
LIFESENTENCE
Victims Voices Heard
3 Strikes
You Have the Power . . . Know How to Use It
The Renée Olubunmi Rondeau Peace Foundation
The HOPE Network
S.T.E.V.I.E. Support
Justice for Homicide Victims

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	12
ARGUMENT	13
I. TO ABOLISH THE LIFE WITHOUT PAROLE SENTENCE FOR JUVENILE OFFENDERS ON THE HEELS OF *ROPER* WOULD BE A BAIT-AND-SWITCH VIOLATIVE OF THE HARD-WON RIGHTS OF VICTIMS	13
II. THE OVERWHELMING NATIONAL CONSENSUS IS THAT JUVENILE LIFE WITHOUT PAROLE IS APPROPRIATE AND CONSTITUTIONAL IN LIMITED CASES	21
III. UPHOLDING LIFE WITHOUT PAROLE FOR JUVENILE OFFENDERS IS ESSENTIAL FOR THE PROTECTION OF AMERICA'S LAW-ABIDING CITIZENS, PARTICULARLY ITS INNOCENT CHILDREN	24
IV. THE CONSTITUTIONAL JUVENILE LIFE WITHOUT PAROLE SENTENCE IS A NECESSARY AND EFFECTIVE TOOL WITHIN THE CRIMINAL JUSTICE SYSTEM	26
CONCLUSION	28

TABLE OF AUTHORITIES

Page

CASES

Calderon v. Schribner, No. 2:06-cv-00770-TMB, 2009 WL 89279 (E.D. Cal. Jan. 12, 2009) 21

Culpepper v. State, 971 So. 2d 259 (Fla. Dist. Ct. App. 2008), *cert. denied*, 981 So. 2d 1199 (Fla. 2008) 21

In re Nunez, 173 Cal. App. 4th 709 (Ct. App. 4th Dist. 2009).....22

Kenna v. U.S. Dist. Ct. for the Ctr. Dist. of Cal., 435 F.3d 1011 (9th Cir. 2000).....14

Linda R. S. v. Richard D., 410 U.S. 614 (1972).....14

Naovarath v. State, 779 P.2d 944 (Nev. 1989) 22

People v. Bentley, No. 214170, 2000 WL 33519653 (Mich. Ct. App. Apr. 11, 2000).....21

People v. Cooks, 648 N.E.2d 190 (Ill. Ct. App. 1995) 21

Phillips v. State, 807 So. 2d 713 (Fla. Dist. Ct. App. 2002) 21

Roper v. Simmons, 543 U.S. 551 (2005).....*passim*

State v. Massey, 803 P.2d 340 (Wash. Ct. App. 1990) 22

State v. Howell, 34 S.W.3d 484 (Tenn. Crim. App. 2000) 21

State v. Jensen, 579 N.W.2d 613 (S.D. 1998) 21

State v. Loukaitis, 1999 WL 1044203 (Wash. Ct. App. 1999).....21

TABLE OF AUTHORITIES – Continued

Page

State v. Warren, 887 N.E.2d 1145 (Ohio 2008) 21

Tate v. State, 864 So. 2d 44 (Fla. Dist. Ct. App. 2003) 21

United States v. L.M., 425 F.Supp. 2d 948 (Iowa N.D. 2006) 16

STATUTES

Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771 (2004).....16

Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 1512-1515 (1982).....15

Victims' Rights and Restitution Act of 1990, 42 U.S.C. §§ 10606-10607 (1990).....16

Colo. Rev. Stat. § 17-22.5-104(d)(IV) (2006) 23

S.B. 839, 81st Leg., Reg. Sess. (Tex. 2009) 23

OTHER AUTHORITIES

1996 Victims' Rights Sourcebook: A Compilation and Comparison of Victims' Rights Laws, Nat'l Victim Ctr., 1997, § 13.....18

David Beatty *et al.*, Office of Justice Programs, *New Directions from the Field: Victims' Rights and Services for the 21st Century*, U.S. Dep't of Justice, 1997, at 7, *available at* http://www.ojp.usdoj.gov/ovc/new/directions/pdftxt/direct.pdf (last visited Sept. 17, 2009).....18

TABLE OF AUTHORITIES – Continued

Page

Committee Strikes Down Fair Sentencing for Youth Act, Calif. Chron., July 2, 2009, *available at* http://www.californiachronicle.com/articles/view/108384 (last visited Sept. 17, 2009) 23

Joanna Tucker Davis, *The Grassroots Beginnings of the Victims' Rights Movement*, Nat'l Crime Victim Law Inst. (2004), *available at* http://www.ncvli.org/objects/ReportingCrime.pdf (last visited Sept. 17, 2009) 13

Juvenile Justice Accountability and Improvement Act of 2007, H.R. 4300, 109th Cong. (2007).....22

Juvenile Justice Accountability and Improvement Act of 2009, H.R. 2289, 110th Cong. (2009).....22

Robert Elias, *Victims of the System* 109 (Transaction Books Brunswick, NJ 1983) 17

Dean G. Kilpatrick *et al.*, Office of Justice Programs, *The Rights of Crime Victims – Does Legal Protection Make a Difference?*, U.S. Dep't of Justice, Dec. 1998, *available at* http://www.ncjrs.gov/pdffiles/173839.pdf (last visited Sept. 17, 2009).....15

Eartha Jane Melzer, *As Bill to Ban Life Imprisonment for Children Languishes, Inequities of Defense Persist*, Mich. Messenger, April 13, 2009 *available at* http://michiganmessenger.com/16689/as-bill-to-ban-life-imprisonment-for-children-languishes-inequities-of-defens-persist (last visited Sept. 17, 2009) 23

TABLE OF AUTHORITIES – Continued

Page

Office of Justice Programs, *Delinquency Cases Waived to Criminal Court, 2005*, U.S. Dep't of Justice (June 2009) 27

Office of Justice Programs, *Juvenile Offenders and Victims: 2006 National Report*, U.S. Dep't of Justice (2006).....24, 25

Office of Justice Programs, *Victims of Violent Juvenile Crime*, U.S. Dep't of Justice (July 2004) 26

Amanda Paulson, *States Reconsider Life Behind Bars for Youth*, Christ. Sci. Mon., March 12, 2008 23

President's Task Force on Victims of Crime, *Final Report*, Washington, D.C.: U.S. Government Printing Office, Dec. 1982.....14, 15, 16, 17

Claudia Rowe, *A Look at Why State Teens Can Get Life Without Parole*, Seattle Post-Intelligencer, Feb. 5, 2009 22

Charles D. Stimson & Andrew M. Grossman, *Adult Time for Adult Crimes: Life Without Parole for Juvenile Killers and Violent Teens*, The Heritage Foundation, Aug. 2009, *available at* http://www.heritage.org/research/crime/upload/lwop.pdf (last visited Sept. 17, 2009) 24

Howard N. Snyder, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Arrests 2006*, U.S. Dep't of Justice, Nov. 2008, *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/221338.pdf (last visited Sept. 17, 2009) 25

INTEREST OF *AMICI CURIAE*[1]

National Organization of Victims of Juvenile Lifers ("NOVJL") is a national organization comprised of the families of victims murdered by juvenile offenders, who subsequently were tried and sentenced as adults because of the horrific nature of their extremely violent crimes. NOVJL works to find other victims of violent juvenile offenders tried and sentenced as adults to life in order to protect their voices in the national public policy discussion about the juvenile life sentence and to support each other as victims of the devastating acts of criminally violent teens.

Victims for Justice ("VFJ") specializes in serving and advocating for victims of all violent crimes including assault, robbery, and kidnapping as well as the surviving family and friends of homicide victims. VFJ helps victims cope with trauma and grief, ensures the judicial system respects their rights, advocates for change that will make a balanced justice

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, or its counsel made a monetary contribution to its preparation or submission. Petitioner Sullivan and Respondents received timely notice of intent of *amici* to file this brief and letters of consent by the parties have been filed with the Clerk of this Court. *Amici* requested and were granted consent by counsel of record for Petitioner Graham and consent is being filed with this brief.

system, and implements community programs for violence prevention.

Victims of Crime Amendment ("VOCA") was established following the murders of two sorority members at Florida State University in 1978. Its express purpose is to balance the scales of justice by advocating on behalf of families, victims and witnesses. VOCA spearheaded legislation which led to a joint resolution and a statewide citizen vote that successfully amended Florida's Constitution to provide rights for victims of crime and to create and establish victims' rights' offices within the executive office of the governor.

National Organization of Victim Assistance ("NOVA") is a private, non-profit organization of victim and witness assistance programs and practitioners, criminal justice agencies and professionals, mental health professionals, researchers, former victims and survivors, and others committed to the recognition and implementation of victim rights and services. Founded in 1975, NOVA is the oldest national group of its kind in the worldwide victims' movement. NOVA's mission is to promote rights and services for victims of crime and crisis everywhere through national advocacy, direct services to victims, assistance to professional colleagues and membership activities and services.

National Coalition of Victims In Action ("NCVIA") is a component of the Renée Olubunmi Rondeau Peace Foundation. NCVIA's purpose is to encourage

victims of crime to become proactive for crime prevention and to support those victims already involved in order to bring enormous benefit to victims as well as to their communities. Members of the NCVIA come together as a national force to provide services to victims of crime and their families. NCVIA hopes thereby to raise public awareness of the effect of crime on victims and our communities, examine and support changes necessary to deal with the serious flaws in the criminal justice system, provide understanding and assistance to victims and survivors in recovery, and initiate programs related to the direct prevention of crime through long-term sustainable proposals and follow-up programs.

Families and Friends of Violent Crime Victims ("Families and Friends") was founded in Washington State in 1975 as a non-profit crime victim support and advocacy organization. Families and Friends is one of the oldest victim advocacy and support groups in the country and the only statewide organization that provides 24-hour support for victims of robbery, victims of identity theft, victims of aggravated assault, loved ones of homicide victims and families of adults who are missing where foul play is suspected. Family and Friends' goals include examining the criminal justice system, giving assistance to families and friends of victims during times of grief, and educating the public on the impact violent crime has in our society.

National Organization of Parents of Murdered Children, Inc. ("POMC®") is a victims' rights organization that provides the on-going emotional support needed to help parents and other survivors facilitate the reconstruction of a "new life" and to promote a healthy resolution. Not only does POMC help survivors deal with their acute grief but it also helps these survivors successfully interact with the criminal justice system. POMC makes the difference through continuing emotional support, education, prevention, advocacy and awareness. POMC provides support and assistance to all survivors of homicide victims while working to create a world free of murder.

Central Minnesota Chapter of Parents of Murdered Children, Inc. provides an increased awareness for prevention and aftermath of murder. It offers victim help groups where survivors may discuss their stories and find assistance for how to cope with their grief.

Greater Cincinnati Area Chapter of Parents of Murdered Children, Inc. provides support and assistance to survivors of murdered children. Members help one another by sharing experiences, feelings and insights and by allowing others to do the same.

Houston, Texas Chapter of Parents of Murdered Children, Inc. is a branch of the nation's only nonprofit self-help organization designed to provide support and assistance to all survivors of homicide

victims while working to create a world free of murder.

Northwestern Pennsylvania Chapter of Parents of Murdered Children, Inc. is a support group that supplies information about the grief process, provides emotional support to bereaved survivors and works to prevent the parole of violent criminals.

Southwest Louisiana Chapter of Parents of Murdered Children, Inc. is a self-help support group for the families and friends of those who have died by violence. It seeks to bring public awareness to the devastation that murder leaves in its wake.

Utah Chapter of Parents of Murdered Children, Inc. is a statewide non-profit organization that provides on-going emotional support, education, prevention, advocacy and awareness for victims of violent crime.

Association of Prosecuting Attorneys ("APA") is a national "think tank" that represents prosecutors and provides them with additional resources such as training and technical assistance. APA's goal is to develop proactive innovative prosecutorial practices that prevent crime, ensure equal justice and make our communities safer.

The Ben Doran Foundation ("Foundation") addresses the legislature, stands with crime victims' families and ensures no one forgets loved ones lost to the unimaginable horror of murder. The Foundation was created to speak up and speak out about crime

victims' rights and to address the many societal issues that lend themselves to murder and homicide. The Foundation is constantly forming new relationships with community non-profit leaders, law enforcement, legislators and the beautiful people who support it.

Survivors in Action, Inc. ("SIA") is a non-profit national advocacy group that supports victims and the families of victims of any crime, including domestic violence, identity theft, elder abuse, cyberstalking, child abuse, rape and sexual assault. Other national organizations typically help victims at specific points in the victimization cycle – such as when they first report the crime or in writing parole opposition letters – leaving "gaps" in needed services. SIA is the only organization that fills the support gaps for victims, providing guidance through all stages of the journey from victim to survivor, with no time limitations, cut-off dates or conditions. SIA's mission is to ensure that no victim anywhere in the nation is left behind.

Citizens Against Homicide ("CAH") is a non-profit organization in which the majority of Board members have lost a family member to murder, are surviving the devastating loss of a loved one, and are continuing to suffer the emotional trauma of coping with the criminal justice system. The members have joined together to create a body of support and a voice for the survivors and friends of murder victims.

Justice for All ("JFA") is an all-volunteer, non-profit organization founded in 1993. JFA advocates for change in a criminal justice system that is inadequate in protecting the lives and property of law-abiding citizens. Through private citizen and corporate membership, JFA will peacefully exert the social and legislative influence necessary to effect positive change in the criminal justice system.

Crime Victims Action Alliance ("CVAA") is a non-profit social welfare organization that promotes victims' rights and public safety. CVAA aggressively advocates for better laws, regulations and policies, actively supports public officials who respect and endorse the rights of victims of violent crime and holds accountable those who have been entrusted to ensure public safety.

Arizona Voice for Crime Victims is a victims' advocacy organization which ensures crime victims receive their rights to justice, due process and dignified treatment throughout the criminal justice process. Through five separate categories of activities, including educational programs and crisis response training programs, Arizona Voice for Crime Victims seeks to establish a compassionate justice system in which crime victims are informed of their rights, fully understand their rights, know how to assert their rights, have a meaningful way to enforce their rights, and know how to seek immediate crisis intervention when they become victims of crime.

Worldwide Sensible Sentencing Organization ("WWSSO") is a voluntary international organization that supports and advocates for victims of violent crime and for common sense public safety measures that would incarcerate violently dangerous offenders for sentences proportionate to their crimes.

Witness Justice is a national, grassroots, non-profit organization providing support and advocacy for survivors of violence and trauma. Founded in 2002, its mission is to empower and assist victims of violence and their loved ones in healing from trauma and in navigating the criminal justice process. Each month, Witness Justice receives more than 150,000 hits on its website and approximately 300 individuals turn to it for direct assistance, making it one of the most sought-after victim service providers in the country. Witness Justice provides information and support from its expert corps of volunteers, connection through its virtual community, training resources for service providers, and direct assistance to any survivor who may have questions in the aftermath of violence. When necessary, Witness Justice advocates with legislators, state systems, and other organizations to foster positive social change that will provide the best potential for survivors' healing and justice.

Crime Victims United of California ("CVUC") is a non-partisan, non-profit organization dedicated solely to protecting the rights of victims. CVUC's mission is to restore and maintain balance in California's criminal justice system, which for too long has put

criminals' rights ahead of victims' rights. CVUC is the only organization of its kind in California using education, legislative advocacy and political action to enhance public safety, promote effective crime-reduction measures and strengthen the rights of crime victims.

Crime Victims United of Oregon ("CVU") was founded in 1983 to advance the rights of crime victims and enhance the safety of all law-abiding Oregonians by addressing problems in Oregon's criminal justice system. CVU's mission is to promote a more balanced justice system through legislative action and public awareness. Through the tireless efforts of many volunteers, most of them victims of violent crime, much progress has been made toward fulfilling our mission. CVU's philosophy is that the laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions, and reformation.

IllinoisVictims.org is the only statewide victims' rights organization in Illinois. The organization acts as a watchdog over issues pertaining to victims of violent crime in the state of Illinois, especially in government and legislation. IllinoisVictims.org is an information clearinghouse and resource network of support for all victims of violent crime in Illinois, with a special focus on homicide victims.

LIFESENTENCE is a victims' rights organization with a goal of educating youth, parents and the public about the effects of violence. Through its presentation on choices, LifeSentence shares our own

real life stories in a very graphic and powerful way. LifeSentence brings the reality of violent crime to the youth of today in a way that they can understand – through a mother's heart.

Victims Voices Heard is a non-profit advocacy organization committed to assisting all victims and survivors of crime. The organization advocates for all victims as they seek to find the answers that will enable them to feel empowered and move forward with their lives. It provides a dialogue program that offers victims and victims' survivors of violent crimes the opportunity to meet with their offender face-to-face in order to facilitate the healing recovery process. It acts as an advocate on behalf of the victim, helping them through the process and arranging a safe and secure environment for the meeting to take place.

3 Strikes is a non-profit organization that strives to keep violent and serious repeat offenders behind bars. The organization tracks and posts on the Internet related data for public access studies and statistics pertinent to crime in general and to 3 Strikes in particular. It was the author of California's 3 Strikes and You're Out Law, Proposition 184.

You Have the Power . . . Know How to Use It, Inc. is a non-profit agency created in 1993 in the State of Tennessee as a volunteer, grassroots effort composed of concerned citizens, crime survivors, and representatives from the office of the district attorney, law enforcement and community agencies. The organization is dedicated to raising awareness about crime

and justice issues. Its goal is to prevent violent crime and reduce victimization. It conducts educational programs, creates documentary videos, and produces practice resource books on topics such as domestic violence, elder abuse, methamphetamine, and child sexual abuse.

The Renée Olubunmi Rondeau Peace Foundation (RORPF) works to promote awareness on the part of the American public as to the magnitude of the crime problem and to individual and collective responsibility for the solution. RORPF seeks to accomplish its mission by involvement in three areas: Direct Service to crime victims through the National Coalition of Victims in Action; Educational Support through the Renée Olubunmi Rondeau Memorial Scholarship Fund; and Advocacy through Action Americans: Murder Must End Now! (AAMMEN!).

S.T.E.V.I.E. SUPPORT (Striving Towards Eradicating Violence in Ennercities) is a non-profit victims organization. Its mission is to mobilize, educate, empower, and assist survivors of homicides as to the social ills of the public health epidemic of violence. The organization seeks to put in place the necessary mechanisms by which lives will be saved and restored and communities can and will be reclaimed.

Justice for Homicide Victims ("JHV") provides support to victims who fight for their rights and to be the champion of the legal rights of survivors of homicide victims by providing them information about victim rights in all aspects of the criminal justice

system. JHV seeks to educate the public as to the injustices in the present system of criminal justice in California. Only when the people are aware of the facts can change and reform be accomplished.

SUMMARY OF ARGUMENT

Despite numerous advancements in the criminal justice system, crime victims[2] remain second-class citizens. Today, this Court is being asked to engage in a callous bait-and-switch by improperly extending its decision in *Roper v. Simmons*[3] to declare that life without parole for violent juveniles offends the Eighth Amendment. We urge this Court to remain faithful to the Constitution of the United States and its own jurisprudence, which clearly differentiates between the sentence of death and all others, including life without parole.

An overwhelming national consensus exists that a life without parole sentence is appropriate and constitutional for juvenile offenders who show an exceptional disregard for human life. Courts, legislatures, and American people have strongly approved of these sentences as an effective and lawful device to deter juvenile crime and protect law-abiding citizens.

---

[2] The word "victim" throughout this brief is intended to include the actual victim as well as the victim's family.

[3] 543 U.S. 551 (2005).

These institutions understand that violent crimes are no less traumatizing to victims because the offenders are underage. A criminal justice system which categorically denies constitutional and proper sentences for juvenile offenders perpetuates no justice at all.

ARGUMENT

I. TO ABOLISH THE LIFE WITHOUT PAROLE SENTENCE FOR JUVENILE OFFENDERS ON THE HEELS OF *ROPER* WOULD BE A BAIT-AND-SWITCH VIOLATIVE OF THE HARD-WON RIGHTS OF VICTIMS.

For most of American history,[4] the criminal and juvenile justice systems failed to acknowledge a role for victims. Conventional thought held an "assumption that crime victims should behave like good

[4] At the birth of our country, crime victims were solely responsible for investigating and prosecuting the crimes committed against them. As society increasingly realized it had an interest in ensuring crimes were prosecuted, and prosecuted fairly, a new system emerged that coupled private prosecution with public prosecutors. Once governments appointed public prosecutors, however, private prosecution became increasingly rare and eventually nonexistent. This newly created process resulted in the unintentional exclusion of crime victims. Joanna Tucker Davis, *The Grassroots Beginnings of the Victims' Rights Movement*, Nat'l Crime Victim Law Inst. (2004), *available at* http://www.ncvli.org/objects/ReportingCrime.pdf (last visited Sept. 17, 2009).

Victorian children – seen but not heard."[5] More than 30 years ago, however, this Court catalyzed the Modern Crime Victims' Rights Movement, which finally gave the innocent a voice. In *Linda R. S. v. Richard D.*,[6] this Court denied a crime victim's right to compel a criminal prosecution because "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."[7] This Court then suggested that Congress "may enact statutes creating legal rights, the invasion of which [would] create standing" for a crime victim.[8]

In the early 1980s, President Ronald Reagan, in response to a national outcry for fundamental victims' rights, appointed the President's Task Force on Victims of Crime ("Task Force"). The President directed the Task Force to assess the treatment of crime victims in the criminal justice system.[9] The Task Force members were unanimous in their many findings: "The innocent victims of crime have been overlooked, their pleas for justice have gone unheeded, and their wounds – personal, emotional and financial – have gone unattended."[10] The Task Force

---

[5] *Kenna v. U.S. Dist. Ct. for the Ctr. Dist. of Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2000).

[6] 410 U.S. 614 (1972).

[7] *Id.* at 619.

[8] *Id.* at 616, n.3.

[9] President's Task Force on Victims of Crime, *Final Report*, Washington, D.C.: U.S. Government Printing Office, Dec. 1982.

[10] *Id.* at ii.

found poor treatment of crime victims more widespread than it had expected and that "somewhere along the way the system ha[d] lost track of the simple truth that it is supposed to be fair and protect those who obey the law while punishing those who break it."[11] The Task Force recommended sweeping changes, aimed at restoring balance to the skewed criminal justice system. These recommendations implicated every segment of government and society: federal, state and local governments as well as the private sector.[12]

The response to the irrefutable evidence that the criminal justice system had systematically denied victims' rights was overwhelming. The growing recognition of the plight of victims – aided by the Court's suggestion and the Task Force's report – led to profound reforms in the adult system. Within 10 years, every state had enacted statutory rights for crime victims and many adopted constitutional amendments protecting victims' rights.[13] As of today, all states have adopted a statutory crime victims' bill of rights and 33 states have passed constitutional amendments that guarantee rights for crime victims.[14] In the federal system, Congress passed the

---

[11] *Id.* at vi.

[12] *Id.* at ii.

[13] Dean G. Kilpatrick *et al.*, Office of Justice Programs, *The Rights of Crime Victims – Does Legal Protection Make a Difference?*, U.S. Dep't of Justice, Dec. 1998, *available at* http://www.ncjrs.gov/pdffiles/173839.pdf (last visited Sept. 17, 2009).

[14] *Id.*

Victim and Witness Protection Act of 1982,[15] its purpose is "to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process; to ensure that the federal government does all that is possible to assist victims and witnesses of crime . . . , and to provide model legislation for state and local governments." In 1990, Congress continued its robust endorsement of victims' rights by enacting the first federal bill of rights for victims of crime – the Victim's Rights and Restitution Act of 1990.[16] Finally, Congress passed the Crime Victims' Rights Act of 2004,[17] which significantly expanded the rights of crime victims for crimes committed by adults and provided specific enforcement mechanisms and placed a duty on the federal courts to ensure victims are afforded these rights.

Despite these hard-won and deserved advances in victims' rights, the criminal justice system still routinely denies victims their rights of involvement and participation. Studies continue to highlight the re-victimizing and re-traumatizing of victims the

---

[15] 18 U.S.C. §§ 1512-1515 (1982).

[16] 42 U.S.C. §§ 10606-10607 (1990).

[17] 18 U.S.C. § 3771 (2004). The definition of "victim" in section 3771(e) of the Crime Victims' Rights Act of 2004 (CVRA) is not limited to victims of adult offenders; thus, it seems that victims of juvenile offenders also possess these explicit rights. A current federal court case, *United States v. L.M.*, 425 F.Supp. 2d 948 (Iowa N.D. 2006), confronted the issue of whether the CVRA applies to juvenile proceedings and concluded that these rights do attach to victims of juvenile offenders so long as the proceedings are considered public.

criminal justice system imposes. One study found many victims abandon pursuing criminal charges due to the torment of dealing with a system that either ignores them outright or treats them as second-class citizens.[18] These victims feel helpless, as if the system designed to protect and advocate for them, instead abandons them. Further, victims perceive that those in the system – prosecutors, defense attorneys, and judges – appear to not care about them or the crimes committed against them.[19] Another study found nearly one-third of victims interviewed would not get involved again with the criminal justice system.[20] This latter study is alarming because, as the Task Force stated, "[w]ithout the cooperation of victims and witnesses in reporting and testifying about crime, it is impossible in a free society to hold criminals accountable."[21]

Unfortunately, state juvenile justice systems still lack many of the hard-fought reforms achieved in the adult system. For example, only 13 of the 45 states that enacted some form of victims' rights legislation by 1988 specifically included victims of juvenile

---

[18] Robert Elias, *Victims of the System* 109 (Transaction Books Brunswick, NJ 1983).

[19] *Id.*

[20] *Id.* at 132.

[21] President's Task Force on Victims of Crime, *supra* n.7, at vi.

offenders.[22] Only half the states have enacted comprehensive notification and participatory rights for victims of serious juvenile offenses. Moreover, those states only allow the victim to be notified or attend hearings if the case involves an offense considered a felony if perpetrated by an adult.[23] In addition, enforcement problems have rendered ineffective some recent on-point legislation. After an in-depth review of victims' rights within the juvenile justice system, the National Victim Center reported "most of the rights for victims of juvenile offenders should more accurately be called suggestions, or recommendations, as they are only advisory in nature."[24] Thus, victims of juvenile offenders have not experienced the same advancements of protection of rights as victims of adult offenders – this means the criminal justice system treats victims of the same or similar crimes vastly different solely due to the perpetrator's age.

---

[22] David Beatty *et al.*, Office of Justice Programs, *New Directions from the Field: Victims' Rights and Services for the 21st Century*, U.S. Dep't of Justice, 1997, at 7, *available at* http://www.ojp.usdoj.gov/ovc/new/directions/pdftxt/direct.pdf (last visited Sept. 17, 2009).

[23] *Id.*

[24] *1996 Victims' Rights Sourcebook: A Compilation and Comparison of Victims' Rights Laws, Nat'l Victim Ctr.*, 1997, § 13.

The *Roper* opinion abolished the death sentence for juveniles; however, the Court then immediately and unambiguously approved of the life without parole sentence for juveniles. The Court reasoned this substitute would sufficiently serve as a deterrent, one of the death penalty's "two distinct social purposes."[25] This Court stated "[t]o the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person."[26] Thus, this Court relied on the availability and constitutionality of life without parole for juvenile offenders for its conclusion the death sentence for juveniles violates the Eighth Amendment. To hold contrary now, a mere four years later, would be an egregious bait-and-switch that re-victimizes and re-traumatizes innocent victims who deserve consistency and finality of the law.

This is not an issue of innocence; juries found these offenders guilty in a court of law. Moreover, judges determined appropriately severe sentences for them, taking into account the exceptionally cruel acts and callous disregard of human life these offenders demonstrated. After enduring arduous trials, the criminal justice system promised victims their offenders would never be released. Now petitioner's request

---

[25] *Roper*, 543 U.S. at 571.

[26] *Id.* at 572.

threatens victims with the real possibility they will have to endure trying the case over and over in parole hearings for the rest of their lives, and possibly even their children's lives. In many instances, the crimes committed by juveniles who received life without parole occurred many years ago, even decades. To now subject victims to regular parole hearings with their offenders would be unjust and unfairly burdensome – evidence may have been lost or misplaced, memories have faded, and witnesses have either died or relocated. To reopen final sentences and require victims to regularly engage with their offenders in parole hearings would serve only to transfer the life sentences from the guilty offenders to the innocent victims.

This Court is asked to retroactively deny legislatures, courts, and society the right to enforce sentences of life without parole against violent juvenile offenders. Any such decision would result in a callous bait-and-switch that would necessarily be an affront to victims. The criminal justice system promised these victims, and this Court affirmed in *Roper* that their offenders would never be released. To deny victims the finality of the law and the opportunity to recover from the horror and cruelty of the violence perpetrated against them would be a merciless swindle.

II. THE OVERWHELMING NATIONAL CONSENSUS IS THAT JUVENILE LIFE WITHOUT PAROLE IS APPROPRIATE AND CONSTITUTIONAL IN LIMITED CASES.

Every state and federal appellate court that has confronted the constitutionality of juvenile life without parole has upheld this rare sentence.[27] And

---

[27] *See, e.g., Calderon v. Schribner*, No. 2:06-cv-00770-TMB, 2009 WL 89279, *4-6 (E.D. Cal. Jan. 12, 2009) (upholding life sentence without parole for a 17-year-old convicted of kidnapping for ransom with bodily injury, but not death); *Culpepper v. State*, 971 So. 2d 259 (Fla. Dist. Ct. App. 2008), *cert. denied*, 981 So. 2d 1199 (Fla. 2008) (holding that *Roper* does not provide basis for claim that mandatory life without parole imposed on 14-year-old for murder violates the Eighth Amendment); *Tate v. State*, 864 So. 2d 44 (Fla. Dist. Ct. App. 2003) (finding no Eighth Amendment violation from imposition of mandatory life sentence on 12-year-old for murder of six-year-old); *Phillips v. State*, 807 So. 2d 713 (Fla. Dist. Ct. App. 2002) (holding life without parole imposed on 14-year-old for murder of eight-year-old not violative of the Eighth Amendment); *People v. Cooks*, 648 N.E.2d 190 (Ill. Ct. App. 1995) (holding mandatory life sentence given to 14-year-old for double murder did not violate Eighth Amendment); *People v. Bentley*, No. 214170, 2000 WL 33519653 (Mich. Ct. App. Apr. 11, 2000) (finding 14-year-old murderer's mandatory non-parolable life sentence did not violate state or federal prohibition against cruel and unusual punishment); *State v. Warren*, 887 N.E.2d 1145 (Ohio 2008) (upholding life sentence without parole for a 15-year-old convicted of kidnapping and forcibly raping a nine-year-old victim over two months); *State v. Jensen*, 579 N.W.2d 613 (S.D. 1998) (holding life sentence given to 14-year-old who murdered cab driver was not grossly disproportionate); *State v. Howell*, 34 S.W.3d 484 (Tenn. Crim. App. 2000) (holding natural-life sentence for 14-year-old did not violate the state and constitutional prohibitions on cruel and unusual punishment); *State v. Loukaitis*, 1999 WL 1044203

(Continued on following page)

despite the vast amount of resources expended by advocacy groups on behalf of juvenile perpetrators, only two states, Texas and Colorado, have passed any legislation reforming juvenile life without parole sentences.[28] Yet both states apply the revised juvenile sentences prospectively, and Colorado still requires

---

(Wash. Ct. App. 1999) (finding Eighth Amendment analysis not necessary where 14-year-old given life without parole for murdering a teacher and two students and wounding another); *State v. Massey*, 803 P.2d 340 (Wash. Ct. App. 1990) (finding natural life sentence given to 13-year-old for murder did not violate the Eighth Amendment). *But see Naovarath v. State*, 779 P.2d 944 (Nev. 1989) (relying on the Nevada Constitution and the Eighth Amendment to the U.S. Constitution to strike down a sentence of life without parole imposed on a 13-year-old who had been molested by the man he killed); *In re Nunez*, 173 Cal. App. 4th 709 (Ct. App. 4th Dist. 2009) (vacating a sentence of life without parole imposed on an offender who committed a kidnapping when he was 14 years old on the grounds that the sentence was disproportionate compared to the penalty for murder and therefore "serves no valid penological purpose"). While *Naovarath* and *Nunez* each upset a sentence of life without parole, neither called into question the constitutionality of the sentence as applied to juvenile offenders.

[28] The other states include California, Michigan, Nebraska, Florida, Washington, and Louisiana. Claudia Rowe, *A Look at Why State Teens Can Get Life Without Parole*, Seattle Post-Intelligencer, Feb. 5, 2009, at A1. Similar legislation has been introduced at least twice at the federal level. Juvenile Justice Accountability and Improvement Act of 2009, H.R. 2289, 110th Cong. (2009); Juvenile Justice Accountability and Improvement Act of 2007, H.R. 4300, 109th Cong. (2007). The 2007 bill attracted only two supporters out of the 435-member House of Representatives. The more recent bill has attracted no more support.

juvenile offenders to serve a minimum of 40 years before they receive their first parole review.[29]

In other states where legislatures have introduced bills to end or moderate life without parole sentences for juveniles, the legislation[30] either languishes or is quickly defeated outright, presumably because no public support exists to change a law that would release violent offenders solely due to their age at the time they committed their crime. The courts, legislatures, and citizens have overwhelmingly approved the availability of the life without parole sentence for juveniles. Thus, any decision contrary to this express will would not only be an affront to all

---

[29] Colo. Rev. Stat. § 17-22.5-104(d)(IV) (2006); S.B. 839, 81st Leg., Reg. Sess. (Tex. 2009) (passed in both House and Senate, May, 2009).

[30] For example, legislation in California that would ban juvenile life without parole sentences recently failed a vote in Committee. *Committee Strikes Down Fair Sentencing for Youth Act*, Calif. Chron., July 2, 2009, *available at* http://www.californiachronicle.com/articles/view/108384 (last visited Sept. 17, 2009). The key sponsor in an Illinois measure to abolish juvenile life without parole has backed off stating that more dialogue is needed between the juvenile advocates and the victims. Amanda Paulson, *States Reconsider Life Behind Bars for Youth*, Christ. Sci. Mon., March 12, 2008. Also, the Michigan legislation to end juvenile life without parole sentences "remains stalled in the Senate Judiciary Committee." Eartha Jane Melzer, *As Bill to Ban Life Imprisonment for Children Languishes, Inequities of Defense Persist*, Mich. Messenger, April 13, 2009 *available at* http://michiganmessenger.com/16689/as-bill-to-ban-life-imprisonment-for-children-languishes-inequities-of-defense-persist (last visited Sept. 17, 2009).

crime victims but also to the country's law-abiding public.

III. UPHOLDING LIFE WITHOUT PAROLE FOR JUVENILE OFFENDERS IS ESSENTIAL FOR THE PROTECTION OF AMERICA'S LAW-ABIDING CITIZENS, PARTICULARLY ITS INNOCENT CHILDREN.

The United States has the worst juvenile crime rate in the Western world and ranks third in the world in the number of murders committed by juveniles.[31] In 2003, 15 percent of male arrests and 20 percent of female arrests involved a person under 18.[32] Starting in the late 1980s and continuing into the 1990s, the Violent Crime Index arrest rate for juvenile offenders rose dramatically.[33] By 1994, the arrest rate of juvenile offenders for violent crimes had risen 61 percent above its 1988 level.[34] Yet this astonishing increase was not the only story – the seriousness and heinousness of juvenile crimes had

---

[31] Charles D. Stimson & Andrew M. Grossman, *Adult Time for Adult Crimes: Life Without Parole for Juvenile Killers and Violent Teens*, The Heritage Foundation, Aug. 2009, *available at* http://www.heritage.org/research/crime/upload/lwop.pdf#page=5 (last visited Sept. 17, 2009).

[32] Office of Justice Programs, *Juvenile Offenders and Victims: 2006 National Report*, U.S. Dep't of Justice (2006), at 126.

[33] *Id.* at 132.

[34] *Id.*

also intensified. During the period between 1987 and 1993, the juvenile arrest rate for murder increased 110 percent.[35] The juvenile arrest rate for forcible rape grew 44 percent between 1980 and 1991.[36]

The terrifying rise in juvenile violent crime prompted many states to pass legislation imposing harsher penalties and longer sentences; these new policies have proven overwhelmingly effective. Juvenile crime has decreased substantially since its peak in 1993.[37] According to the United States Department of Justice, the juvenile arrest rate for Violent Crime Index offenses fell 49 percent between 1994 and 2004, reaching its lowest level since at least 1980.[38] In 2006, the growth in the juvenile murder arrest rate was 73 percent below its 1993 peak.[39]

Despite the proven success of tougher accountability for juvenile offenders, a few advocacy groups are lobbying for a return to a juvenile justice system with ineffective and inappropriate penalties. These groups argue that 'children' should not be held fully accountable for their crimes and that the criminal justice system needs to protect juveniles from the

---

[35] *Id.*

[36] *Id.*

[37] Howard N. Snyder, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Arrests 2006*, U.S. Dep't of Justice, Nov. 2008, *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/221338.pdf (last visited Sept. 17, 2009).

[38] *Id.*

[39] *Id.*

harsher aspects of the system. What these advocacy groups fail to acknowledge, is that softening sentences for juvenile offenders puts actual children in harm's way – innocent ones, not those who have committed violent crimes. About 62 percent of victims of nonfatal violence committed by juvenile offenders were themselves under 18.[40] Children make up 95 percent of the victims of sexual assaults committed by juveniles.[41] Juvenile offenders committed about 1 in 2 violent offenses against children; only 1 in 10 violent offenses against adults were committed by a juvenile offender.[42]

IV. THE CONSTITUTIONAL JUVENILE LIFE WITHOUT PAROLE SENTENCE IS A NECESSARY AND EFFECTIVE TOOL WITHIN THE CRIMINAL JUSTICE SYSTEM.

The *amici* do not oppose the juvenile justice system in general. The criminal justice system appropriately affords juvenile offenders extra layers of legal protection for a variety of socially significant reasons. Most states already have processes in place that review and evaluate appropriate charges and channels of prosecution that look to the individual facts of each case.

---

[40] Office of Justice Programs, *Victims of Violent Juvenile Crime*, U.S. Dep't of Justice (July 2004).

[41] *Id.*

[42] *Id.*

Although most juvenile offenders should not and do not have their cases adjudicated in the adult criminal justice system, the legislatures, the courts and the American people recognize limited exceptions for particularly heinous offenses. In 2005, juvenile courts transferred less than 1 percent of cases to the adult system.[43] These cases represented the very worst acts perpetrated on other human beings and call for adjudication in courts appropriate for the crime.

The *amici* are not advocating for a more broad application of the life without parole sentence for juvenile offenders; courts should use it sparingly, as is currently the case. But the life without parole sentence is an effective sentence for the worst juvenile offenders and thus has a place in the nation's criminal justice system. At a minimum, the Court should affirm its decision in *Roper*, which allows states to enact legislation to manage the life without parole process for juvenile offenders and, indeed, the juvenile justice system as the constitutionally empowered state law makers decide.

---

[43] Office of Justice Programs, *Delinquency Cases Waived to Criminal Court, 2005*, U.S. Dep't of Justice (June 2009).

CONCLUSION

Since *Roper*, advocacy groups have pursued an intense national campaign to eliminate or moderate life without parole sentences for juveniles. Unfortunately, these groups have often presented inaccurate portraits of the offenders and their offenses that misinform the public policy discussion. Advocacy groups have expended significant resources on convicted juveniles, most of whom are guilty and often unrepentant of cruel and aggravated offenses. The victims, however, are all too often left feeling discarded and insulted by the system formed to protect them. When debate arises about perpetrators' sentences, victims are often treated like unwelcome interlopers. Yet, their perspective is central to the discussion because there would be no crime, sentence or debate without first the innocent victims. Thus, any sweeping, retroactive legal decision which does not first take into account the interests of victims, would only serve to re-victimize the very people this system is designed to protect.

The petitioners are asking this Court to further restrict victims' rights to hold juvenile offenders accountable for heinous crimes and to require these devastated victims to be re-traumatized in constant legal reengagement with the offenders in unending parole hearings. This only serves to transfer the life sentence from the culpable offender to the innocent victim.

The *amici* are hopeful this Court will continue to affirm legal finality for traumatized victims who will never forget the depth of the horrors committed against the victims by these juvenile offenders. The life without parole sentence for juveniles is appropriately rare and reserved only for the worst of the worst offenders. The *amici* ask this Court to follow its reasoning in *Roper* and uphold the constitutionality of the life without parole sentence for violent juvenile offenders.

Respectfully submitted,

SHANNON LEE GOESSLING
Counsel of Record
SOUTHEASTERN LEGAL FOUNDATION
6100 Lake Forrest Drive, N.W.
Suite 520
Atlanta, Georgia 30328
(404) 257-9667

Attorney for Amici Curiae

September 21, 2009

AMICUS CURIAE BRIEF

134 (13) (13)

Nos. 08-7412 & 08-7621

Supreme Court, U.S.
FILED
JUL 23 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TERRANCE JAMAR GRAHAM
Petitioner,

v.

FLORIDA,
Respondent.

JOE HARRIS SULLIVAN,
Petitioner,

v.

FLORIDA,
Respondent.

On Writs of Certiorari to the District Court of Appeal of Florida, First District

BRIEF OF THE SENTENCING PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

MATTHEW M. SHORS
SHANNON M. PAZUR
(*Counsel of Record*)
SARA ZDEB*
O'MELVENY & MYERS
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
* *Admitted only in Maryland; supervised by principals of the firm.*

Attorneys for Amicus Curiae

005 4VY
TC+TA

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. SENTENCING JUVENILES TO LIFE WITHOUT PAROLE IS CONTRARY TO THIS COURT'S FINDING IN *ROPER* THAT THEY ARE FUNDAMENTALLY DIFFERENT THAN ADULTS 5

A. In Light Of Their Diminished Culpability, Juveniles Should Not Be Subjected To The Severe Sanction Of Life Without Parole 5

B. Sentencing Juveniles To Life Without Parole Denies Their Unique Potential For Reform 8

II. LIFE WITHOUT PAROLE IS OFTEN IMPOSED ON JUVENILES WITHOUT ANY CONSIDERATION OF THEIR DIMINISHED CULPABILITY 14

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Atkins v. Virginia,
536 U.S. 304 (2002) 3

Claiborne v. United States,
551 U.S. 87 (2007) 1

Eddings v. Oklahoma,
455 U.S. 104 (1982) 5

Enmund v. Florida,
458 U.S. 782 (1982) 3, 7

Hampton v. Kentucky,
666 S.W.2d 737 (Ky. 1984) 3, 14

Harmelin v. Michigan,
501 U.S. 957 (1991) 10, 15

In re Gault,
387 U.S. 1 (1967) 9

Johnson v. Texas,
509 U.S. 350 (1993) 10

Kimbrough v. United States,
552 U.S. 85 (2007) 1

Naovarath v. State,
779 P.2d 944 (Nev. 1989) 5, 11

Roper v. Simmons,
543 U.S. 551 (2005) ..... passim

Solem v. Helm,
463 U.S. 277 (1983) 8, 10

Thompson v. Oklahoma,
487 U.S. 815 (1988) 3, 5, 9

Workman v. Commonwealth,
429 S.W.2d 374 (Ky. 1968) 9

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

20 U.S.C. § 1070a 11
20 U.S.C. § 1151 11
Ark. Code Ann. § 9-27-318 18
Conn. Gen. Stat. § 46b-127 19
Fla. Stat. § 985.557 18
705 Ill. Comp. Stat. § 405/5-130 21
720 Ill. Comp. Stat. § 5/5-2 21
730 Ill. Comp. Stat. § 5/5-8-1 22
Mich. Comp. Laws § 600.606 18

OTHER AUTHORITIES

Paolo G. Annino et al., *Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation* (2009), *available at* http://www.law.fsu.edu/faculty/profiles/annino/Report_JuvenileLifeSentence.pdf 7

Brief of American Medical Association et al. as *Amici Curiae* Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (No. 03-633) 6

Gail B. Goodman, Comment, *Arrested Development: An Alternative To Juveniles Serving Life Sentences*, 78 U. Colo. L. Rev. 1059 (2007) 9, 21

TABLE OF AUTHORITIES
(continued)

Page(s)

Patrick Griffin et al., Office of Juvenile Justice and Delinquency Prevention, *Trying Juveniles As Adults in Criminal Court: An Analysis Of State Transfer Provisions* (1998), *available at* http://www.ncjrs.gov/pdffiles/172836.pdf 18, 19

Human Rights Watch, *When I Die, They'll Send Me Home: Youth Sentenced To Life Without Parole In California* (2008), *available at* http://www.hrw.org/reports/2008/us0108/us0108web.pdf 12, 13

Human Rights Watch & Amnesty International, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (2005), *available at* http://www.hrw.reports/2005/us1005/TheRestofTheirLives.pdf ..... passim

Illinois Coalition for the Fair Sentencing of Children, *Categorically Less Culpable* (2008), *available at* http://www.law.northwestern.edu/cfjc/jlwop/ JLWOP_Report.pdf ..... passim

Sue Lindsay, *Growing Up in Prison*, Rocky Mountain News, Sept. 19, 2005 21

Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 Wake Forest L. Rev. 681 (1998) 17

TABLE OF AUTHORITIES
(continued)

Page(s)

Hillary J. Massey, *Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole After* Roper, 47 B.C. L. Rev. 1083 (2006) 9, 17

Ashley Nellis and Ryan S. King, The Sentencing Project, *No Exit: The Expanding Use of Life Sentences in America* (2009), *available at* http://www.sentencingproject.org ..... passim

Office of Justice Programs, Dep't of Justice, *Juveniles in Adult Prisons and Jails: A National Assessment, available at* http://www.ncjrs.gov/pdffiles1/bja/182503-2.pdf 13

Richard E. Redding, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Transfer Laws: An Effective Deterrent To Delinquency?* (2008), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf 17, 18

Washington Coalition For The Just Treatment Of Youth, *A Reexamination Of Youth Involvement In The Adult Criminal Justice System In Washington* (2009), *available at* http://www.columbialegal.org/~lumbia/files/JLWOP_cls.pdf 22

BRIEF OF THE SENTENCING PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

This brief is submitted on behalf of the Sentencing Project as *amicus curiae* in support of Petitioners.[1]

INTEREST OF *AMICUS CURIAE*

The Sentencing Project is a non-profit organization dedicated to promoting rational and effective public policy on issues of crime and justice. Through research, education, and advocacy, the organization analyzes the effects of sentencing and incarceration policies, and promotes cost-effective and humane responses to crime. The Sentencing Project has filed *amicus curiae* briefs in prior sentencing cases before this Court, including *Kimbrough v. United States*, 552 U.S. 85 (2007) (addressing lack of empirical basis for Guidelines sentences in crack-cocaine cases), *Claiborne v. United States*, 551 U.S. 87 (2007), and *Roper v. Simmons*, 543 U.S. 551 (2005).

The Sentencing Project has also produced a broad range of scholarship on the sentencing of juveniles to life without parole and related topics, such as the transfer of juveniles into the adult criminal system. Members of its staff have been invited to present tes-

---

[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

timony on juvenile life without parole before Congress, state legislatures, and professional audiences, and have testified on legislative reform proposals before the House Judiciary Committee.

INTRODUCTION AND SUMMARY OF ARGUMENT

In Florida and other states, juveniles – sometimes as young as 13 or 14 at the time of their offense – are serving life sentences without the possibility of parole. In some cases, they are serving these sentences for offenses in which no homicide was committed, or in cases in which they acted as an accomplice for an older, more culpable defendant's crime. And in many cases, juveniles are serving life-without-parole sentences that are effectively mandatory, rather than the result of careful and individualized sentencing decisions. State law frequently requires both that these juvenile offenders be tried as adults and that, upon conviction, they be sentenced to life without parole, meaning that no judge or jury ever considered whether the juvenile's age or culpability potentially warranted a lesser sentence.

These sentences violate the Eighth Amendment's prohibition on cruel and unusual punishment. The Eighth Amendment is grounded in the "basic precept of justice that punishment for crime should be graduated and proportioned to the offense." *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (citations and quotation marks omitted). Whether a particular penalty comports with this proportionality requirement depends in large part on the culpability of the offender – a factor that has motivated this Court's rejection of disproportionate penalties in a variety of

circumstances. *See, e.g.*, *Roper*, 543 U.S. at 569-70; *Atkins v. Virginia*, 536 U.S. 304, 319 (2002); *Enmund v. Florida*, 458 U.S. 782, 797-801 (1982).

Nowhere is the question of a defendant's culpability more relevant than in sentences involving juvenile offenders, whom this Court has long recognized are less blameworthy than adults who commit similar crimes. *See, e.g.*, *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) ("less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult") (plurality op.). In particular, juveniles lack the same maturity as adults, are more susceptible to negative influences, and possess a greater capacity for reform over time. *Roper*, 543 U.S. at 569-70. This Court has determined that because of these "marked and well understood" differences between juveniles and adults, *id.* at 572-73, the Eighth Amendment prohibits imposition of the death penalty on offenders under the age of 18, *id.* at 578.

That same reasoning applies with equal force to sentences of life without parole for juvenile offenders. Life without parole, "like death, is a sentence different in quality and character from a sentence to a term of years subject to parole," *Hampton v. Kentucky*, 666 S.W.2d 737, 741 (Ky. 1984) – and its imposition runs counter to this Court's conclusion that juveniles cannot be classified "among the worst offenders," *Roper*, 543 U.S. at 570. Indeed, life without parole not only condemns juveniles to a sentence that reflects a determination that they can never be rehabilitated, it removes incentives for good behavior by making it effectively impossible in many cases for

juveniles to access rehabilitative services that are in practice reserved for offenders with lesser sentences.

It is no answer to the Eighth Amendment problem to say that individual judges and juries are in the best position to make case-by-case decisions about which juvenile offenders deserve a life-without-parole sentence. Unlike the sentence this Court considered in *Roper*, life without parole is often imposed on juveniles without any individualized consideration of their diminished culpability. Before *Roper*'s categorical ban on the sentence, the death penalty could only be imposed on a juvenile after a judge or jury considered his culpability. *See Roper*, 543 U.S. at 602-03 (O'Connor, J., dissenting). In the context of life without parole, however, such individualized consideration is frequently unavailable or even impossible. Mandatory transfer and mandatory sentencing laws, whose use has expanded dramatically over the past two decades, create a perfect storm for juvenile offenders: They require that juveniles be tried in the adult system and, upon conviction, mandate a sentence of life without parole. Together, these laws deny many juveniles any opportunity to have their age, home environment, history of abuse, and other factors related to their culpability considered at any stage of the proceedings against them.

For these reasons, the Eighth Amendment prohibits the imposition of life without parole on juvenile offenders. The judgments below should be reversed.

ARGUMENT

I. SENTENCING JUVENILES TO LIFE WITHOUT PAROLE IS CONTRARY TO THIS COURT'S FINDING IN *ROPER* THAT THEY ARE FUNDAMENTALLY DIFFERENT THAN ADULTS

Because of their diminished culpability – recognized by this Court, demonstrated by science, and underscored by sentencing practices – juveniles cannot be classified among the worst offenders. Rather, "juveniles have a greater claim than adults to be forgiven" when they commit crimes. *Roper*, 543 U.S. at 570; *see also Naovarath v. State*, 779 P.2d 944, 948 (Nev. 1989) (juvenile life without parole is excessive "given the undeniably lesser culpability of children for their bad actions"). Sentencing juveniles to life without parole ignores this diminished culpability and, like the death penalty, wholly denies their unique potential for rehabilitation.

A. In Light Of Their Diminished Culpability, Juveniles Should Not Be Subjected To The Severe Sanction Of Life Without Parole

This Court has long recognized that juveniles, because of their young age and diminished culpability, cannot be considered among the worst offenders. *See Thompson*, 487 U.S. at 835 (juveniles' "irresponsible conduct is not as morally reprehensible as that of an adult"); *Eddings v. Oklahoma*, 455 U.S. 104, 116 & n.11 (1982). This diminished culpability flows from three well-established differences between juveniles and adults: Juveniles are less mature and more

likely than adults to act recklessly; they are more susceptible to negative influences and peer pressure; and their character traits are less firmly-fixed than those of adults. *Roper*, 543 U.S. at 569-70.

As scientists have widely documented, these behavioral differences reflect differences between the juvenile and adult brain. Brain imaging research (using Magnetic Resonance Imaging and other techniques) has provided new information about the degree to which juvenile and adult brains differ – and how these differences increase juveniles' aggression and risk-taking behavior while diminishing their judgment and ability to control impulses. *See generally* Brief of American Medical Association et al. as *Amici Curiae* Supporting Respondent, *Roper*, 543 U.S. 551 (No. 03-633) (synthesizing scientific literature). To take only one important example, adolescent brains are more active in areas related to aggression and anger, and are not fully developed in areas that control reasoning, risk taking, and impulse control. *Id.*

Sentencing trends confirm that juveniles serving life without parole are not the most culpable offenders. The present cases illustrate that fact. Here, both petitioners were sentenced to life without parole for non-homicide offenses: Terrance Graham, a first-time offender, received the sentence for a probation violation and underlying charges of armed burglary and attempted armed robbery, Cert. Pet. 2, *Graham v. Florida*; Joe Sullivan was sentenced to

life without parole after being convicted of sexual battery, Cert. Pet. 3, *Sullivan v. Florida*.[2]

Even in those cases in which loss of life occurs, life without parole – the most severe penalty to which juveniles may be subjected – is frequently imposed on juvenile offenders who did not intend to cause harm, even though "[i]t is fundamental that causing harm intentionally must be punished more severely than causing the same harm unintentionally." *Enmund*, 458 U.S. at 798. More than a quarter of juveniles serving life without parole were convicted of felony-murder – a crime in which the juvenile offenders did not intend to commit murder and may have been only minimally involved. *See* Human Rights Watch & Amnesty International, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 27 (2005), *available at* http://www.hrw.reports/2005/us1005/TheRestofTheirLives.pdf. In other cases, juveniles have been sentenced to life without parole for aiding and abetting homicides committed by other persons. *Id.* at 28 (nearly half of juveniles sentenced to life without parole in Michigan were convicted of felony murder or aiding and abetting); *see also* Illinois Coalition for the Fair Sentencing of Children, *Categorically Less Culpable* 11 (2008), *available at*

---

[2] Florida – which has sentenced juveniles to life without parole for offenses including burglary, carjacking, and battery – appears uniquely out of step with other states when it comes to imposing the sentence for non-homicide offenses. *See* Paolo G. Annino et al., *Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to Nation* 3 (2009), *available at* http://www.law.fsu.edu/faculty/profiles/annino/Report_JuvenileLifeSentence.pdf.

http://www.law.northwestern.edu/cfjc/jlwop/JLWOP_Report.pdf (discussing Illinois' "accountability statute," which imposes severe sentences on accomplices). Juvenile offenders often have adult co-defendants who played a larger role in the crime yet, in some cases, receive a lesser sentence.

For example, one 16-year old – Patrick McLemore – was sentenced to life without parole in Michigan for aiding and abetting a murder his 20-year old accomplice committed. McLemore was not in the residence where the murder took place when it occurred, yet his co-defendant – who pled guilty – received a shorter sentence. *See* Ashley Nellis and Ryan S. King, The Sentencing Project, *No Exit: The Expanding Use of Life Sentences in America* 33 (2009), *available at* http://www.sentencingproject.org.

Nor has juvenile life without parole been reserved for recidivists. To the contrary, the majority of juveniles sentenced to life without parole – like Terrance Graham – are not chronic offenders. *See* Human Rights Watch, *The Rest of Their Lives*, *supra*, at 28. Indeed, 59 percent of juveniles serving life without parole received the sentence for their first criminal conviction, *id.* – even though society assigns greater culpability to habitual offenders, *see Solem v. Helm*, 463 U.S. 277, 296 (1983).

B. Sentencing Juveniles To Life Without Parole Denies Their Unique Potential For Reform

Life without parole not only ignores juveniles' diminished culpability; it extinguishes any possibility for rehabilitation, even though it is widely-

recognized that juveniles possess a unique capacity for reform. *See Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968) ("it is *impossible* to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life") (emphasis added).

1. Precisely because the adolescent brain is not yet fully developed, juveniles possess character traits that are more transitory than those of adults and, accordingly, are more likely to change as they mature. *See* Gail B. Goodman, Comment, *Arrested Development: An Alternative To Juveniles Serving Life Sentences*, 78 U. Colo. L. Rev. 1059, 1082-83 (2007). This unique potential for reform has been accepted for a century; indeed, rehabilitation was the original cornerstone of the juvenile justice system, established at the turn of the Twentieth Century with a goal of reforming juvenile offenders and enabling their return as productive members of society. *See In re Gault*, 387 U.S. 1, 15-16 (1967); Hillary J. Massey, *Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole After* Roper, 47 B.C. L. Rev. 1083, 1086-87 (2006).

For this reason, just as this Court has long acknowledged that juveniles are less culpable than adults, it has likewise recognized that they possess a greater capacity for reform. *Roper*, 543 U.S. at 570 ("it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed"); *see also Thompson*, 487 U.S. at 837 (acknowledging the "teenager's capacity for growth"). As the Court has explained, "the signature qualities

of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Johnson v. Texas*, 509 U.S. 350, 368 (1993).

This capacity for reform, in turn, counsels against imposing penalties on juveniles that utterly reject even the possibility of rehabilitation over the course of an offender's lifetime. The prospect of rehabilitation was thus an important factor in this Court's holding that juveniles cannot constitutionally be sentenced to death. *See Roper*, 543 U.S. at 573-74 ("When a juvenile offender commits a heinous crime . . . the State cannot extinguish his . . . potential to attain a mature understanding of his own humanity.").

This reasoning applies with equal force to juvenile life without parole. Life without parole – like the death penalty – ignores juvenile offenders' capacity for reform and entirely rejects the possibility of rehabilitation. *See Harmelin v. Michigan*, 501 U.S. 957, 1028 (1991) (Stevens, J., dissenting) ("a mandatory sentence of life imprisonment without the possibility of parole does share one important characteristic of a death sentence: The offender will never regain his freedom . . . such a sentence does not even purport to serve a rehabilitative function").

A "regular part of the rehabilitative process," *Solem v. Helm*, 463 U.S. 277, 300 (1983), parole does not guarantee that juvenile offenders will be released; rather, it provides them with the opportunity to demonstrate their progress and rehabilitation at a parole hearing. *See* Nellis and King, *No Exit*, *supra*, at 30. By depriving juveniles of this basic opportu-

nity, a sentence of life without parole sends them the same stark message as the death penalty does: They are beyond redemption, and any attempt at rehabilitation is futile. *See Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989) ("Denial of [parole] means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [a juvenile], he will remain in prison for the rest of his days.").

2. This wholesale rejection of rehabilitation has a tangible impact on juveniles serving life sentences without parole. Federal laws, prison policies, and a lack of resources combine to deprive juveniles of educational opportunities and vocational training services available to other inmates. As a result, juveniles who want to reform themselves are often unable to do so.

Post-secondary education, for example, is effectively unavailable to juveniles sentenced to life without parole. A 1994 statute eliminated the availability of Pell Grants for inmates pursuing post-secondary education, *see* 20 U.S.C. § 1070a(b)(7); at present, federal assistance is limited to grants to prisons to help inmates acquire literacy, life, and job skills through post-secondary education, *see* 20 U.S.C. § 1151(f). But this assistance is available only to inmates under 35 years of age who are within seven years of release – a standard that juveniles serving life without parole will, of course, never meet. *Id.* As a result, only those juveniles who can pay for course fees themselves are able to pursue post-secondary education. These fees are often be-

yond the means of prisoners and their families. *See* Human Rights Watch, *The Rest of Their Lives*, *supra*, at 69.

Other rehabilitative services are similarly unavailable to juveniles sentenced to life without parole. Confronted with limited resources, prisons often give enrollment preference for education, vocational, and other services to inmates with shorter sentences. *See* Human Rights Watch, *The Rest of Their Lives*, *supra*, at 70-71 (Pennsylvania and California corrections department representatives explain that inmates sentenced to life without parole have lowest priority and may have difficulty accessing vocational programs). These policies can deny access to basic rehabilitative services – such as GED courses or Alcoholics Anonymous meetings – for inmates sentenced to life without parole as juveniles. *See* Illinois Coalition for the Fair Sentencing of Children, *Categorically Less Culpable*, *supra*, at 21; Human Rights Watch, *When I Die, They'll Send Me Home: Youth Sentenced To Life Without Parole In California* 56-57 (2008), *available at* http://www.hrw.org/reports/2008/us0108/us0108web.pdf.

In still other cases, prison security classifications prevent juveniles from accessing vocational and other rehabilitative services. In California, for example, inmates are assigned security levels based in part on the severity of their sentence; state regulations mandate that inmates sentenced to life without parole receive a high security level that restricts their movement throughout the prison and their access to work programs. *See id.* Unlike other in-

mates, they receive this high security classification regardless of their behavior – limiting the ability of juveniles to access rehabilitation services no matter how well they behave. *Id.*

3. The practical impact of denying rehabilitation is bleak: Juveniles suffer hopelessness and isolation at the time in their lives when education and other developmental opportunities are most critical. Of course, many juveniles sentenced to life without parole strive successfully to better themselves, notwithstanding the barriers to accessing rehabilitative services. *See, e.g., id.* at 48-49. In other cases, however, juveniles may react to the isolation and hopelessness of their sentence with disruptive behavior, *see* Human Rights Watch, *The Rest of Their Lives*, *supra*, at 57 – a perverse consequence given their unique potential for reform, and one that could be avoided through precisely those rehabilitative services that juveniles with life sentences cannot access. *See* Office of Justice Programs, Dep't of Justice, *Juveniles in Adult Prisons and Jails: A National Assessment* 63, *available at* http://www.ncjrs.gov/pdffiles1/bja/182503-2.pdf (noting that youthful offenders can be "more difficult to deal with," but that "this population's significant developmental, emotional, and cognitive issues can be addressed by appropriate programming"). To make matters worse, young offenders may also fall prey to the violent behavior of other inmates: Juveniles incarcerated in adult prisons face a serious risk of sexual and physical assault. *See* Nellis and King, *No Exit*, *supra*, at 39.

In short, juvenile life without parole rejects rehabilitation in theory and in practice. Like the death penalty, therefore, the practical effect of a life-without-parole sentence is to extinguish any possibility for juvenile offenders to "attain a mature understanding of [their] own humanity." *See Roper*, 543 U.S. at 576; *see also Hampton*, 666 S.W.2d at 741 (life without parole, "like death, is a sentence different in quality and character" from sentences to a term of years").

II. LIFE WITHOUT PAROLE IS OFTEN IMPOSED ON JUVENILES WITHOUT ANY CONSIDERATION OF THEIR DIMINISHED CULPABILITY

For the reasons set forth above and accepted by this Court in *Roper*, sentencing juveniles to life without parole violates the Eighth Amendment – particularly where, as here, it is imposed for non-homicide offenses. This violation persists no matter what procedure is used to impose the sentence. But there is another compelling reason to prohibit juvenile life without parole that was not present in *Roper*: the sentence, unlike the death penalty, is often imposed on juveniles without any consideration by a judge or jury of their diminished culpability.

Before *Roper* held that the Eighth Amendment categorically prohibits sentencing juveniles to death, a judge or jury was required to consider juvenile offenders' diminished culpability on a case-by-case basis before imposing the death penalty. *See Roper*, 543 U.S. at 602-03 (O'Connor, J., dissenting). Indeed, it was in part because of the availability of this individualized consideration that some members of

this Court rejected the imposition of a categorical bar against the penalty. *See id.* (concerns about juvenile culpability can be addressed "through individualized sentencing in which juries are required to give appropriate mitigating weight to" a juvenile's diminished culpability); *id.* at 620 (Scalia, J., dissenting).

Because predicting a juvenile's future characteristics is so difficult, of course, *Roper* ultimately concluded that no individualized sentencing procedure could cure the juvenile death penalty's Eighth Amendment violation. *See* 543 U.S. at 572-73. And while this reasoning applies with equal force here, juvenile offenders who receive life-without-parole sentences are often deprived of even the individual consideration that this Court ultimately found inadequate in *Roper*. Indeed, unlike death penalty cases – where individualized consideration of a defendant's culpability is constitutionally required – individualized consideration is frequently impossible in cases involving juvenile life without parole.[3] Instead, juvenile offenders are frequently subject to mandatory transfer and mandatory sentencing statutes, whose use has exploded during the past two decades. The combined effect of these laws often dooms juvenile offenders. At the outset, they require many juveniles to be tried as adults. Then, upon conviction in the adult system, they mandate life-

---

[3] Juveniles' uniquely diminished culpability sets juvenile life without parole apart from terms of years imposed on adult offenders such as the one this Court considered in *Harmelin v. Michigan*, 501 U.S. 957 (1991), where the concerns that this Court raised in *Roper* were not present.

without-parole sentences for certain crimes. Together, these laws deny juveniles any opportunity to have their age and diminished culpability considered by any decision-maker at any stage of the proceedings against them.

1. Juvenile life without parole sentences are precipitated by a transfer from juvenile court to the adult criminal system – an occurrence that has grown in use and become less discretionary over time. *See* Nellis and King, *No Exit*, *supra*, at 29. To transfer juveniles to the adult system, states employ a variety of mechanisms, the use and expansion of which grew dramatically during the 1990s in response to warnings – long since proven unfounded – about an impending crime wave caused by juvenile "superpredators." Between 1985 and 1994 alone, the number of juveniles transferred to adult court nationwide doubled; this doubling, in turn, fueled an increase in the number of juveniles sentenced to life without parole. *Id.*[4]

While waiver into the adult system has always been allowed, it has become far less discretionary in recent years. Since the early-Twentieth Century inception of the juvenile justice system, juvenile judges

---

[4] The present cases illustrate how transfer to the adult system necessarily increases a juvenile's risk of receiving a life-without-parole sentence. Terrance Graham was charged as an adult under a statute that vests prosecutors with unreviewable discretion to file charges against juveniles directly in adult court, *see* Pet'r Br. 13, *Graham v. Florida*; Joe Sullivan was charged in adult court under the state's mandatory direct filing law, *see* Pet'r Br. 2, *Sullivan v. Florida*. In neither case would the petitioner have received a life-without-parole sentence had he been convicted in the juvenile system.

have largely retained the discretion to waive jurisdiction and allow prosecution of adolescents in adult court. *See* Massey, *Disposing of Children*, *supra*, at 1087. When exercising this discretion, a judge typically waives jurisdiction only after considering an individual juvenile's circumstances: for example, his home life, susceptibility to peer pressure, and degree of involvement in the crime. Newly-enacted direct filing and mandatory waiver statutes, however, eliminate judicial discretion altogether. Because of the expanded use of these statutes, the number of juveniles who received some sort of judicial transfer hearing prior to being sentenced to life without parole has declined markedly. *See* Human Rights Watch, *The Rest of Their Lives*, *supra*, at 19 (by 2000, only 13 percent of juveniles tried in adult court had received a prior transfer hearing before a juvenile court).

Direct filing, for example, permits prosecutors to file charges against a juvenile directly in adult court. The prosecutor unilaterally determines whether to prosecute a particular juvenile as an adult, with no judicial transfer hearing and typically on the sole basis that probable cause exists to believe the juvenile committed the crime in question. *See* Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 Wake Forest L. Rev. 681, 714-15 (1998). Fourteen states and the District of Columbia have enacted direct filing laws, and the offenses which are subject to direct filing – and the ages to which the statutes apply – vary by state. *See* Richard E. Redding, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Transfer Laws: An Effective Deterrent To Delinquency?* 2

(2008), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf.

In many states, direct filing laws cover a vast group of offenses – not just the most serious ones. In Arkansas, for example, prosecutors may file charges in adult court against 14- and 15-year olds for offenses including kidnapping and first-degree battery, and against juveniles who are 16 and older for any felony at all. *See* Ark. Code Ann. § 9-27-318(c). In Michigan, the state's direct filing law grants criminal courts jurisdiction over juveniles as young as 14 for offenses ranging from carjacking to escape from a juvenile facility, as well as a variety of drug crimes. Mich. Comp. Laws § 600.606. And in Florida, the direct filing statute permits prosecutors to charge 14- and 15-year olds in adult court for offenses including grand theft of a motor vehicle and committing a lewd action in front of a minor; when the juvenile is 16 or older, it permits direct filing for any crime – including, in some circumstances, misdemeanors. Fla. Stat. § 985.557; *see also* Patrick Griffin et al., Office of Juvenile Justice and Delinquency Prevention, *Trying Juveniles As Adults in Criminal Court: An Analysis Of State Transfer Provisions* 8 (1998), *available at* http://www.ncjrs.gov/pdffiles/172836.pdf. In none of these cases does a judge consider the culpability of the individual juvenile offender before he is charged in adult court.

Mandatory waiver laws permit no more discretion for judges than do direct filing statutes. In force in 29 states, *see* Redding, *Juvenile Transfer Laws*, *supra*, at 2, mandatory waiver laws require juvenile judges to relinquish jurisdiction if a juvenile meets

certain criteria: for example, if he is charged with a particular crime. While cases subject to mandatory waiver originate in juvenile court, the juvenile judge has no discretion to consider an offender's age or culpability; his only role is to confirm that the statutory criteria are met and, if so, to send the juvenile to adult court. *See* Griffin, *Trying Juveniles As Adults in Criminal Court*, *supra*, at 4. The statutes can make consideration of a juvenile's culpability difficult in more subtle ways, too. Connecticut's mandatory waiver statute, for example, requires juveniles as young as 14 to be transferred to adult court when charged with certain felonies. The law prohibits the juvenile's attorney from filing any motion, or otherwise making any argument, to oppose the mandatory waiver. *See* Conn. Gen. Stat. § 46b-127(a). And while the statute requires a juvenile judge to find probable cause before mandatory waiver applies to certain felonies, the probable cause hearing occurs without notice, a hearing, or any participation by the juvenile or his attorney. *See id.*; *see also* Griffin, *supra*, at 6.

2. Compounding the effect of mandatory transfer laws are mandatory sentencing statutes, which require judges to impose life without parole in certain circumstances. By design, these statutes wholly remove sentencing discretion from judges, preventing them from considering a juvenile's culpability or potential for reform. Not surprisingly, juveniles receive life without parole with a greater frequency in states with mandatory sentencing laws: The eight states with the highest rates of sentencing juveniles to life without parole all make the sentence mandatory upon conviction for certain crimes. *See* Human

Rights Watch, *The Rest of Their Lives*, *supra*, at 37-38. The five states with the lowest rate of imposing the sentence, by contrast (other than those that do not impose it at all), make it discretionary. *See id.* In these states – where sentencing judges retain the ability to weigh juveniles' culpability and potential for reform on a case-by-case basis – the lower rate of imposing life without parole strongly suggests that judges do not view the sentence as a proportionate one for young offenders.[5]

3. Together, mandatory transfer and mandatory sentencing laws present a perfect storm for juveniles: At the outset, they require that the juvenile, if charged with a certain crime, be tried in adult court. Then, upon conviction in the adult system, they require the judge to sentence the juvenile to life without parole. At no stage of the proceedings is a judge permitted to consider the juvenile's degree of involvement in the crime, mental health status, or history of trauma – factors that would, if considered, counsel heavily in favor of a lesser sentence. *See* Nellis and King, *No Exit*, *supra*, at 19.

---

[5] Indeed, some judges have stated in open court that they would not sentence juvenile offenders to life without parole if they retained discretion to impose a lesser sentence. For example, after a juvenile defendant was convicted of first-degree murder by a Cook County jury, Judge Thomas Dwyer informed him that "I sentence you to a term of natural life in the Illinois Department of Corrections . . . That is the sentence that I am mandated by law to impose. If I had my discretion, I would impose another sentence, but that is mandated by law." *See* Illinois Coalition for the Fair Sentencing of Children, *Categorically Less Culpable*, *supra*, at 10.

In practice, the result is unforgiving. In Colorado, for example, prosecutors in 1992 charged 15-year old Jacob Ind as an adult after he murdered his parents, who had subjected him to years of physical and sexual abuse. *See* Gail B. Goodman, Comment, *Arrested Development: An Alternative to Juveniles Serving Live Without Parole in Colorado*, 78 U. Colo. L. Rev. 1059, 1059-60 (2007). Under Colorado's mandatory sentencing statute, the judge was required to sentence Ind to life without parole without regard for his abuse – a fact with which she expressed frustration. *Id.* at 1060; *see also* Sue Lindsay, *Growing Up in Prison*, Rocky Mountain News, Sept. 19, 2005, at 6A (Judge Mary Jane Looney remarked that "[i]t seems to me that kind of change [allowing parole] might be an appropriate change in the statute in many cases that I've seen – certainly this case"). While Colorado has since abolished juvenile life without parole, the change was not retroactive; as a result, Ind is still serving the sentence. *See* Nellis and King, *No Exit*, *supra*, at 23.

In Illinois, a punitive aiding and abetting statute has compounded the effect of the state's mandatory transfer and sentencing laws. Under this "accountability statute," an accomplice – no matter how small his role in a crime – must receive the same punishment as the principal. *See* 720 Ill. Comp. Stat. § 5/5-2. The statute acts in tandem with the state's mandatory waiver law, which enables the automatic transfer to adult court of certain juveniles, as young as 15, who are charged on an accountability theory. *See* 705 Ill. Comp. Stat. § 405/5-130. Both statutes are backed up by a mandatory sentencing law, which requires the imposition of life without parole in a va-

riety of cases. 730 Ill. Comp. Stat. § 5/5-8-1. The result: More than 95 percent of juvenile life without parole cases in Illinois were transferred automatically to adult court, and nearly 80 percent of them received a mandatory life-without-parole sentence. *See* Illinois Coalition for the Fair Sentencing of Children, *Categorically Less Culpable*, *supra*, at 11-12. In none of these cases did a judge or jury consider the juvenile offender's age, culpability, or potential for reform.

And in Washington, at least 28 adolescents are serving life sentences without the possibility of parole. In each of these cases, life without parole was the only sentence available to the court; for 13 of the juveniles, the state's mandatory waiver law prevented a judge from ever considering their age or diminished culpability at a transfer hearing. *See* Washington Coalition For The Just Treatment Of Youth, *A Reexamination Of Youth Involvement In The Adult Criminal Justice System In Washington* 13 (2009), *available at* http://www.columbialegal.org/~lumbia/files/JLWOP_cls.pdf.

Despite this Court's admonition that they are less culpable than adults, therefore, juveniles are frequently sentenced to life without parole – the most severe penalty to which they may be subjected – without any consideration of whether the sentence is proportionate in light of their diminished culpability. For this reason, too, juvenile life without parole is a grossly disproportionate sentence that violates the Eighth Amendment.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed.

Respectfully submitted,

MATTHEW M. SHORS
SHANNON M. PAZUR
(Counsel of Record)
SARA ZDEB*
O'MELVENY & MYERS
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
** Admitted only in Maryland; supervised by principals of the firm.*

Attorneys for Amicus Curiae

Dated: July 23, 2009

AMICUS CURIAE BRIEF

Nos. 08-7412; 08-7621

In The Supreme Court of the United States

TERRANCE JAMAR GRAHAM,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

JOE HARRIS SULLIVAN,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA THE FIRST DISTRICT

BRIEF OF SIXTEEN MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Michael P. Farris
Counsel of Record
PATRICK HENRY COLLEGE
One Patrick Henry Circle
Purcellville, Virginia 20132
(540) 338-8712

Counsel for Amici Curiae

September 21, 2009

THE LEX GROUP^{DC} • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities iv

Interest of the *Amici* 1

Summary of Argument 2

Argument 4

I. Article 37 of the UN Convention on the Rights of the Child Is Not Binding on the United States Under the Theory of *Jus Cogens* 4

A. The International *Amici* Inadequately Explain The Developing Theory of *Jus Cogens* 6

B. There is No International Consensus Regarding Juvenile Sentencing 14

1. A number of nations reject the theory that they are prohibited as a matter of law from imposing the sentence of life in prison without parole 19

2. The findings of the UN Committee on the Rights of the Child demonstrate widespread "violations" of Article 37 25

3. Other significant violations of Article 37 are revealed by the UN Committee Reports 30

C. Summary Re *Jus Cogens* and Customary International Law 38

II. The United States is not in Violation of Any Binding Treaty Obligation by Sentencing Juveniles to Life in Prison 40

III. The Coerced Use of International Law Violates The Principle of Self-Determination 43

CONCLUSION 45

TABLE OF AUTHORITIES

Page(s)

CASES

Garza v. Lappin,
253 F.3d 918 (7th Cir. 2001) 42

Matar v. Dichter,
563 F.3d 9 (2d Cir. 2009) 11

Medellín v. Texas,
552 U.S.__, 128 S. Ct. 1346 (2008) 42

NON-U.S. CASES

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda),
45 I.L.M. 562,
2006 WL 1667673 (ICJ 2006) 9, 10

Director of Public Prosecutions, KwaZulu-Natal v. P 2006 (3) SA 515 (SCA); [2006]
1 All SA 446 (SCA);
2006 (1) SACR 243 (SCA) 32

M v. The State, CCT 53/06 [2007]
ZAAC 18 (Const. Ct. of S.A.) 33

U.S. DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL PROVISIONS

The Declaration of Independence
(U.S. 1776) 43, 44

U.S. CONST. art. I Sect. 1 44

U.S. CONST. amend. VII 15, 40, 41

U.S. CONST. amend. X 44

NON-U.S. STATUTES

Powers of Criminal Courts
(Sentencing) Act (U.K., 2000) 34

TREATIES

American Declaration on the Rights and
Duties of Man,
O.A.S. Res. XXX, Art. VII (1948) 42

American Convention on Human Rights,
O.A.S. Treaty Series No. 36,
114 U.N.T.S. 123 (18 July 1978) 42

International Convention on the
Elimination of All Forms of
Racial Discrimination,
G.A. Res. 2106 (XX), Annex,
20 U.N. GAOR Supp. (No. 14) at 47,
U.N. Doc. A/6014,
660 U.N.T.S. 195 (1966) 5, 40

International Covenant on
Civil and Political Rights,
G.A. Res. 2200A, Art. 24(1),
U.N. GAOR, 16th Sess., Supp. No. 16,
U.N. Doc. A/6316,
999 U.N.T.S. 171 (1966) 6, 40

Statutes of the
International Court of Justice,
T.S. No. 993 (1945) 16, 17

United Nations Convention Against
Torture and Other Cruel, Inhuman, or
Degrading Treatment or Punishment,
G.A. Res. 39/46, U.N. GAOR, 39th Sess.,
Supp. No. 51,
U.N. Doc. A/39/51,
1465 U.N.T.S. (1984) 6, 40, 41

United Nations Convention on the
Rights of the Child,
G.A. Res. 61/146,
1577 U.N.T.S. 3 (1989) ..... *passim*

Vienna Convention on the
Law of Treaties,
1155 U.N.T.S. 331 (May 23, 1969) 5, 8, 12

TREATISES

Anthony Aust, *Modern Treaty*
Law and Practice,
Cambridge University Press
(2007 (2nd Edition)) 21, 22

Ian Brownlie, *Principles of*
International Law
(Oxford University Press, Oxford)
(7th ed. 2008) ..... *passim*

Paul Tavernier,
"L'identification des règles fondamentales,
un problem résolu?" in
The Fundamental Rules of the
International Legal Order:
Jus Cogens *and Obligations* Erga Omnes,
Christian Tomuschat and
Jean-Marc Thousvenin (Eds.)
Martinus Nijhoff Publishers Leiden,
The Netherlands (2006) 9, 14

Stefan Kadelbach,
"*Jus Cogens*, Obligations *Erga Omnes* and
other Rules—The Identification of
Fundamental Norms," in
The Fundamental Rules of the
International Legal Order:
Jus Cogens and Obligations Erga Omnes,
Christian Tomuschat and
Jean-Marc Thousvenin (Eds.)
Martinus Nijhoff Publishers Leiden,
The Netherlands (2006) 13, 14, 45

Wladyslaw Czaplinksi,
"*Jus Cogens* and the Law of Treaties" in
The Fundamental Rules of the
International Legal Order:
Jus Cogens and Obligations Erga Omnes,
Christian Tomuschat and
Jean-Marc Thousvenin (Eds.)
Martinus Nijhoff Publishers Leiden,
The Netherlands (2006) 7, 8

OTHER AUTHORITIES

Amnesty International and Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (2005) 20

Black's Law Dictionary (Rev. 4th ed. 1968) 13

Black's Law Dictionary (8th ed. 2004) 13

Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations from 2008 and 2009 CRC/C/BGD-URY ..... *passim*

Connie de la Vega & Michelle Leighton, *Sentencing our Children to Die in Prison*, 42 U.S.F.L. Rev. 983 (2008) 19, 20

Yearbook of the International Law Commission, 1966, Vol. II 8, 12

Interest of the *Amici*

The following members of the United States House of Representatives submit this brief as *amici curiae*: Rep. Thaddeus McCotter (AR), Rep. Doug Lamborn (CO), Rep. Pete Hoekstra (MI), Rep. John Fleming (LA), Rep. Trent Franks (AZ), Rep. Todd Akin (MO), Rep. Robert Latta (OH), Rep. Jim Jordan (OH), Rep. Todd Tiahrt (KS), Rep. Phil Gingery (GA), Rep. Cynthia Lummis (WY), Rep. Dan Burton (IN), Rep. Gus Bilirakis (FL), Rep. Mark Souder (IN), Rep. John Boozman (AR), and Rep. Rob Bishop (UT).[1]

Representatives McCotter and Lamborn are co-chairs of the House Sovereignty Caucus. Many, but not all, of the *amici* are members of this caucus.

These members believe that sovereignty is the ability of a people to determine their own political and national destiny. Just as political power has been driven over the years from state to federal government, today influence is being stripped from our federal government and being granted to international institutions—diminishing the ability of "We the People" to govern our own affairs.

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution intended to fund its preparation or submission. Both the respondent and the petitioners have filed a blanket waiver in both cases.

These members intend to stand to protect and defend the rights of American citizens and the interests of American institutions from the increasing influence of international organizations and multilateral agreements. They also intend to promote policies and practices which protect U.S. self-determination, national security, free trade with free nations, and the advancement of constitutional principles. They are committed to defend American values from encroachment by international actors and provide a voice of opposition to transnational doctrine.

Summary of Argument

Amnesty International and a number of other international *amici* have submitted a brief (hereinafter International *Amici*) which argues that the State of Florida is prohibited by certain international legal obligations from imposing a sentence of life in prison without parole (LWOP) on a juvenile. This brief is submitted in direct response to the International *Amici* and the limited arguments concerning international law made in the briefs of the petitioners and a small number of other *amici*.

The assertion that the United States is the only nation on earth that permits the sentencing of juveniles to life in prison without parole is false. Moreover, the International *Amici* have not given this Court a comprehensive or accurate description of the juvenile sentencing laws in other nations.

The *amici's* theory that the United States is bound to obey the provisions under Article 37 of the United Nations Convention on the Rights of the Child under the principle of *jus cogens* is without factual or legal foundation for at least three reasons:

- The *jus cogens* doctrine has no agreed elements or standards.

- *Jus cogens* has no application outside the invalidation of an offending treaty.

- The prohibition against juvenile life imprisonment does not satisfy the criteria for customary international law because there is no evidence that Article 37 reflects the general international practice of juvenile sentencing or that the other nations of the world feel legally compelled to obey its dictates.

The United States has taken reservations to the other treaties cited by the International *Amici* that render them inapposite to this case.

Finally, we respectfully suggest that the use of international law to attempt to govern the people of the United States violates both the letter and spirit of our Constitution as well as the recognized international human rights principle of self-determination.

Argument

I. Article 37 of the UN Convention on the Rights of the Child Is Not Binding on the United States Under the Theory of *Jus Cogens*

The lead argument of the International *Amici* is that "the prohibition of juvenile life without parole is *jus cogens*" and is thus binding on the United States.[2] This assertion is predicated on an express prohibition contained in Article 37(a) of the United Nations Convention on the Rights of the Child (CRC).[3] All nations are parties to the CRC except for the United States and Somalia.[4]

---

[2] Int'l *Amici* at 10.

[3] Article 37 contains two sections concerning sentencing of juvenile offenders.

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time

[4] Int'l *Amici* at 16, fn. 6.

The United States signed the CRC on February 16, 1995.[5] However, in the intervening 14 years, no President of the United States has submitted the CRC to the Senate for its advice and consent. Until the Senate ratifies the treaty, the United States is not a party and, by definition, is not bound by its provisions even in an international tribunal much less in the domestic courts of the United States. *See*, Vienna Convention on the Law of Treaties (VCLT),[6] Articles 24 (3) and 26. Article 26, which contains the most fundamental principle of international treaty law, *pacta sunt servanda* (agreements must be kept), is especially important. It provides that treaties are binding upon "parties." The duty to obey treaties in good faith is a duty undertaken only by a party.

Even if the United States becomes a party to the CRC by ratification, it is not clear that any obligation contained in that treaty would be self-executing. The United States often takes reservations, declarations or understandings to human rights treaties ensuring that some or all provisions are to be construed as non-self-executing.[7]

---

[5] United Nations Treaty Collection, Chap. IV, Human Rights No. 11.

[6] 1155 U.N.T.S. 331 (May 23, 1969)

[7] *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014, 660 U.N.T.S. 195 (1966) (Ratified: October 21, 1994), Declaration 1: "That the United States declares that the provisions of the Convention are not self-executing." The United States declared Articles 1-27 of the International

The International *Amici* ignore these fundamental principles of international law. They contend that the United States is nonetheless bound to obey the provisions of Article 37 on the notion that it contains rules which are *"jus cogens."* We will show that the sentencing standards in Article 37 cannot possibly be considered *jus cogens* for both factual and legal reasons.

A. The International *Amici* Inadequately Explain The Developing Theory of *Jus Cogens*

The International *Amici* point to Article 53 of the VCLT for recognition of the principle called *"jus cogens."* This article does nothing more than proclaim the invalidity of treaties which contain provisions that violate "peremptory norms."[8] The

---

Covenant on Civil and Political Rights (G.A. Res. 2200A, Art. 24(1), U.N. GAOR, 16th Sess., Supp. No. 16, U.N. Doc. A/6316,999 U.N.T.S. 171 (1966)) and Articles 1-16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (G.A. Res 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, 1465 U.N.T.S. 85 (1984)) to be non-self-executing.

[8] Article 53 reads:

Treaties conflicting with a peremptory norm of general international law ("jus cogens")

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community

widely-used treatise by Professor Ian Brownlie,[9] cited by the International *Amici*,[10] notes that *jus cogens* is a theory of "rules, or rights or duties, on the international plane."[11] *Jus cogens* principles "are rules of customary law which cannot be set aside by treaty or acquiescence. . . ."[12] The purpose of the doctrine of *jus cogens* is to create a rule invalidating offending treaties.

A treatise devoted to the subject of *jus cogens* suggests that the Hitler-Stalin Pact is a good example of a treaty that violates *jus cogens* although it notes that it is also "a good example of confusion and difficulties" associated with this theory.[13]

> of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

[9] Ian Brownlie, *Principles of International Law* (Oxford University Press, Oxford (2008 (7th ed.)). (Hereinafter "Brownlie").

[10] Int'l *Amici* at 11.

[11] Brownlie at 510.

[12] *Id.*

[13] Wladyslaw Czaplinksi, "*Jus Cogens* and the Law of Treaties" in *The Fundamental Rules of the International Legal Order:* Jus Cogens *and Obligations* Erga Omnes, Christian Tomuschat and Jean-Marc Thousvenin (Eds.) Martinus Nijhoff Publishers Leiden, The Netherlands (2006), p. 84. (Hereinafter, *Jus Cogens* Treatise).

Although there is widespread agreement that the theory of *jus cogens* exists, there is little consensus as to which rules fall within the doctrine. No consensus exists as to the elements for judging a claim that some particular action violates *jus cogens*.

The International Law Commission (ILC), which drafted the VCLT, "was convinced that no catalogue of peremptory norms could be formulated."[14] Its 1966 official commentary demonstrates some of the difficulties inherent in the theory of *jus cogens*:

> The formulation of the article is not free from difficulty, since there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*.
>
> ...[T]he majority of the general rules of international law do not have that character....
>
> It is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens*.[15]

---

[14] *Id.* at 87.

[15] Yearbook of the International Law Commission, 1966, Vol. 2, pp. 247-248

The *Jus Cogens* Treatise, *supra*, notes:

> The concept of *jus cogens*, which was discussed at length for a long time during the sixties and the seventies in connection with the work of the International Law Commission on the law of treaties, has now been accepted almost unanimously. By contrast, this consensus disappears concerning the content of *jus cogens* and even its definitions.[16]

Even the brief of the International *Amici* acknowledges that "commentators may disagree on the exact scope of all *jus cogens* norms."[17] However, these *amici* give this Court no objective basis for determining which claims qualify as *jus cogens*. Again, Brownlie says that "the proponent of a rule of *jus cogens* in relation to this article will have a considerable burden of proof."[18]

The International *Amici* are asking this Court to blaze a trail on a theory that even the International Court of Justice has barely touched. In 2006, in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v.*

---

[16] Paul Tavernier, "L'identification des règles fondamentales, un problem résolu?", in *Jus Cogens Treatise*, p. 19.

[17] Int'l *Amici* at 13.

[18] Brownlie at 512.

Rwanda),[19] the ICJ acknowledged *jus cogens* but nonetheless refused to override a nation's lack of refusal to consent to the court's jurisdiction. Judge *Ad Hoc* Dugard's concurring opinion focused on *jus cogens*:

> This is the first occasion on which the International Court of Justice has given its support to the notion of *jus cogens*. It is strange that the Court has taken so long to reach this point because it has shown no hesitation in recognizing the notion of obligation *erga omnes*, which together with *jus cogens* affirms the normative hierarchy of international law.[20]

Armed Activities involved acts of "killing, massacring, raping, throat-cutting, and crucifying...against more than 3,500,000 Congolese."[21] The Court was certain that these actions were violations of the norms of *jus cogens*.[22] Nonetheless, the ICJ dismissed the claims filed by the Republic of the Congo because Rwanda had not consented to the Court's jurisdiction.[23]

---

[19] 45 I.L.M. 562, 2006 WL 1667673 (ICJ 2006).

[20] *Id.* at 610, Dugard, concurring, para. 4.

[21] *Id.* at 568, para. 11(d).

[22] *Id.* at 579, para 64.

[23] *Id.* at 579, para. 64-70.

Judge Dugard explained this limitation on the doctrine of *jus cogens*:

> The approval given to *jus cogens* by the Court in the present Judgment is to be welcomed. However, the Judgment stresses that the scope of *jus cogens* is not unlimited and that the concept is not to be used as an instrument to overthrow accepted doctrines of international law.[24]

The rule of the ICJ is closely parallel to an accepted rule in the courts of the United States. *See, e.g.*, *Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009) ("A claim premised on the violation of *jus cogens* does not withstand foreign sovereign immunity.")

Article 53 of the VCLT describes *jus cogens* principles as those which permit no derogation. But even "non-derogable" principles have their limits, as Dugard noted.

This decision of the ICJ makes it plain that *jus cogens* principles are not always legally enforceable. The requirement of consent by a nation to the jurisdiction of the ICJ was held to be a higher value than the *jus cogens* principle against genocide. Rwanda did not consent to ICJ jurisdiction. The United States has not consented to the CRC. The necessity of our consent should not be overridden by this theory.

---

[24] *Id.* at 610, Dugard, para. 6.

The confusion of the International *Amici* may arise from a misunderstanding of the term "no derogation." Brownlie's treatise reveals the meaning of this key concept, which is found in the commentary of the International Law Commission on the VCLT:

> The Commission commentary makes it clear that by 'derogation' is meant the use of agreement (and presumably acquiescence as a form of agreement) to contract out of rules of general international law. Thus an agreement by a state to allow another state to stop and search its ships on the high seas is valid, but an agreement with a neigbouring state to carry out a joint operation against a racial group straddling the frontier which would constitute genocide if carried out, is void since the prohibition with which the treaty conflicts is a rule of *jus cogens*.[25]

Black's Law Dictionary reveals the key meaning of the term "derogation:"

---

[25] Brownlie at 511-512. The ILC's official commentary provides: "the Commission concluded that in codifying the law of treaties it must start from the basis that to-day there are certain rules from which **States are not competent to derogate at all by a treaty arrangement**, and which may be changed only by another rule of the same character." *Yearbook of the International Law Commission, 1966*, Vol. II, p. 247. (Emphasis added).

> The partial repeal or abrogation of a law by a later act that limits its scope or impairs its utility and force (statutes in derogation of the common law).[26]

It is clear that the impact of this theory is limited to the law of treaties. "*Jus cogens* denominates rules whose effect is to make conflicting treaties void...."[27]

The United States has not entered into any treaty with another nation that obligates American courts to impose LWOP on juvenile felons. If there were such a treaty, then perhaps some court might invalidate the hypothetical "Mandatory LWOP Treaty" under the *jus cogens* theory. The laws of Florida are not treaties and thus may not be invalidated under this theory.

Even though there are no agreed standards for determining which principles are properly classified as *jus cogens*, the International *Amici* ask this Court to undertake what amounts to judicial lawmaking in a field riddled with vagueness. One scholar proclaims:

---

[26] *Black's Law Dictionary* (8th ed. 2004) (first definition). In the 1968 edition—a date that is contemporaneous with the drafting of the VCLT—this is the sole definition. *Black's Law Dictionary* (Rev. 4th ed. 1968).

[27] Stefan Kadelbach, "*Jus Cogens*, Obligations *Erga Omnes* and other Rules—The Identification of Fundamental Norms," in *Jus Cogens* Treatise, p. 26.

> Ultimately, the uncertainties surrounding the identification of the basic rules do not hamper their development in contemporary international law, and the vagueness resulting from this indeterminacy may even favour, in this field like in others, progress of the law.[28]

This Court should not embrace the role of a progressive change agent in the field of contemporary international law. In this nation, the political branches have the sole authority, subject to constitutional limitations, to enact new fundamental legal norms.

B. There is No International Consensus Regarding Juvenile Sentencing

As we have seen, "the criteria which help to identify *jus cogens* norms are not entirely clear."[29] The International *Amici* suggest three criteria, albeit without the benefit of any citation of authority.

> A *jus cogens* norm must fulfill three basic requirements:
>
> 1) it is general or customary international law;

---

[28] Tavernier, *supra*, at 20.

[29] Kadelbach, *supra*, at 28.

> 2) it is accepted by a large majority of states as non-derogable; and
>
> 3) it has not been modified by a new norm of the same status.[30]

Assuming *arguendo* that these criteria have some validity, it is apparent that the content of Article 37 of the Convention on the Rights of the Child simply cannot meet the first of these standards.[31]

The theory of customary international law is advanced in an attempt to convince this Court that the juvenile sentencing standards in Article 37 are binding on the United States. This theory is premised on a bold assertion that the United States is the only nation in the world that is out of compliance with this alleged standard of customary international law. A careful consideration of facts and law concerning the sentencing of juvenile offenders in other nations robs this argument of its alleged status as a principle of CIL. Moreover, the same evidence eliminates any reasonable possibility that this Court could legitimately view this factual assertion as a persuasive authority guiding its domestic interpretation of the Eighth Amendment. It is simply not true that America is the only nation

---

[30] Int'l *Amici* at 13.

[31] We have already discussed the "no derogation" principle above. The third criterion is inapplicable. No one claims that a relevant *jus cogens* principle used to exist but that it has been supplanted.

in "violation" of the sentencing principles contained in Article 37.

The theory of customary international law has come to be grounded, at least in international tribunals, on Article 38(1) of the Statutes of the International Court of Justice. This Article codifies the sources of international law. Subsection (b) lists the relevant elements: "international custom, as evidence of a general practice accepted as law."

Brownlie explains that "what is sought for is a general recognition among States of a certain practice as obligatory. Although occasionally the terms are used interchangeably, 'custom' and 'usage' are terms of art and have different meanings. A usage is a practice which does not reflect a legal obligation."[32]

The relevant factors in ascertaining a rule of customary international law include duration, uniformity or consistency of the practice, generality of the practice, and *opinio juris et necessitatis*.[33]

The *opinio juris* element is most relevant to the matter at hand. This element is reflected in the requirement of Article 38 of the ICJ Statutes as "a general practice *accepted as law*."[34] This element

---

[32] Brownlie at 6. Internal quotation marks and citations omitted.

[33] Brownlie at 7-8.

[34] Brownlie at 8. (Emphasis in the original).

reflects "recognition by states of a certain practice as obligatory."[35] The "practice of States recognizes a distinction between obligation and usage."[36]

If Article 37 of the Convention on the Rights of the Child is to be considered a rule of customary international law then two things must be demonstrated to pass the *opinio juris* element:

(a) it must be shown that the rules contained in that article are widely obeyed by the nations of the world with few exceptions, and

(b) that the acts of obedience must be on the basis that the States believe they are legally obligated to do so.

The International *Amici* and both petitioners contend that "[o]nly the United States still imposes" LWOP.[37] Even if true, taken literally this statement is insufficient to establish a rule of customary international law. What must be proven is that all (or nearly all) of the other nations in the world follow this practice and that they follow this practice because they believe they are legally obligated to do so. The International *Amici* and others point to the fact that all the nations on earth, save the United States and Somalia, have ratified the UN Convention on the Rights of the Child. This treaty is

---

[35] *Id.*

[36] *Id.*

[37] Int'l *Amici* brief at 9.

the sole basis for the claim that other nations feel legally compelled to obey the sentencing standards of Article 37.

The CRC contains a comprehensive set of standards that purport to govern all facets of a child's life. There is a right to leisure contained in Article 31. If the mere adoption of a treaty by 193 nations is a sufficient ground to create a rule of *jus cogens* or customary international law, then the right to leisure clearly qualifies.

However, we will limit our review of the practice of States regarding the juvenile justice rules contained in Article 37—with particular emphasis on the standards for sentencing juvenile offenders. It will be clear that a number of nations reject the notion that they are legally obligated to obey the provisions of Article 37 including the prohibition of the sentence of life in prison without parole for juveniles. Moreover, it will be apparent that the actual practice of nations reveals that there is widespread non-compliance with the juvenile justice sentencing standards contained in the CRC. Thus, the CRC's sentencing standards cannot be considered a rule of customary international law because there is neither a general practice of obedience nor a widespread belief that nations are legally obligated to implement Article 37.

1. A number of nations reject the theory that they are prohibited as a matter of law from imposing the sentence of life in prison without parole

The brief of the International *Amici* reveals an inconsistency in the theory that America is alone in allowing for LWOP sentences. The International *Amici* identify ten nations that "have laws that could permit the sentencing of child offenders to life without parole" but "there are no *known* cases where the sentence has been imposed."[38] These ten are: Antigua and Barbuda, Argentina, Australia, Belize, Brunei, Cuba, Dominica, Saint Vincent and the Grenadines, the Solomon Islands, and Sri Lanka. Even if it is true that there are no known cases in these states—and the methodology for gathering this evidence is highly suspect[39]—any actual practice by these ten nations does not satisfy the second part of the *opinio juris* standard. They must refrain from imposing LWOP out of a belief of a mandatory legal obligation. If the laws of a nation permit LWOP, any refusal to employ that sentence arises from policy or other reasons, not a legal mandate.

The source for the allegation that "only the United States still imposes this penalty," as well as the list of ten nations, is Connie de la Vega & Michelle Leighton, *Sentencing our Children to Die in*

---

[38] Int'l *Amici* at 17. (Emphasis supplied.)

[39] *See, e.g.*, the use of emails "on file with counsel" to demonstrate sentencing practices. Int'l *Amici* at 36.

Prison, 42 U.S.F.L. Rev. 983, 989-1007 (2008). This article claims that "135 counties have expressly rejected the sentence via their domestic legal commitments." *Id.* at 989. It is important to check the source of this claim. The authors of the law review article cite a report entitled *The Rest of Their Lives*, written by Amnesty International and Human Rights Watch. Amnesty International is the lead amicus in the group of International *Amici*. *The Rest of their Lives* contains the following assertion: "At least 132 countries reject life without parole for child offenders **in domestic law *or practice.***"[40]

There is no explanation of how the number 132 in the Amnesty report grew to 135 in the law review article. The more pertinent change is the change from "domestic law or practice" in the Amnesty International publication to "domestic legal commitments" in the law review article. There is a critical difference between *law* and *practice* in this context. This Court has not been given anything that remotely resembles a reliable count of nations with domestic legislation that actually prohibits the imposition of the sentence of LWOP. Without domestic legislation, the legal compulsion prong of the *opinio juris* standard is missing.

The International *Amici* claim to supply the missing proof of the legal-obligation criterion by reference to the fact that 193 nations have become parties to the CRC. The general rule of

---

[40] Amnesty International and Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (2005) p. 5. Emphasis supplied.

international law on the domestic effect of treaty obligations does not support this proposition:

> It should not be assumed that once a treaty has entered into force for a state it is then in force *in* that state; in other words, that it has become part of its law. The point is of particular importance for treaties which accord rights to individuals, such as human rights treaties, where the rights are intended to be exercised by them (and sometimes corporations). International law and domestic law (the law in force within a state; sometimes termed 'municipal', 'internal' or 'national' law) operate on different planes. International law is concerned with the rights and obligations of states and other international legal persons, such as international organisations. When a treaty provides for rights or obligations to be conferred on persons (legal or natural), they can usually be given effect *only* if they are made part of the domestic law of each party, and with provisions for their enforcement.[41]

In the United Kingdom "no provisions of a treaty can have effect in domestic law without legislation." *Id.* at 189. Moreover, "treaties are not supreme law in the United Kingdom, even if they have been incorporated. Parliament, being the

---

[41] Anthony Aust, *Modern Treaty Law and Practice* (Second Ed.) Cambridge University Press (2007), p. 178.

supreme body in the British Constitution, can enact legislation which is inconsistent with treaty obligations." *Id.* at 192.

This Court has been given virtually no information on the domestic sentencing statutes of other nations and international law will not supply the missing link. Most nations are under no legal compulsion to give domestic effect to international treaties.

Not only have the International *Amici* failed to inform this Court of the domestic impact of the CRC in the party states, they have also failed to inform this Court of the significant number of nations that have taken reservations to the CRC which impact the nature of their undertaking even in international law.

Reservations to the CRC

The following nations have taken a general reservation to the entire Convention on the Rights of the Child, which naturally implicates their duty to obey (even as a matter of international law) the provisions of Article 37.

The following States have taken a reservation to the CRC to the effect that if the CRC conflicts with Sharia Law then Sharia law will prevail: Afghanistan, Iran, Iraq, Jordan, Kuwait, Maldives, Mauritania, Syrian Arab Republic, and United Arab Emirates.[42]

---

[42] United Nations Treaty Collection, Chapter IV, No. 11, 1577 U.N.T.S. 3. All reservations may be found at

In a similar vein, Djibouti says that it "shall not consider itself bound by any provisions or articles that are incompatible with its religion and its traditional values."[43]

Additionally, there are a number of reservations concerning Article 37 itself. Australia, Canada, Iceland, Japan, New Zealand, Switzerland, and the United Kingdom have taken reservations to Article 37(c) which provides:

> Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances....

Most of these Article 37(c) reservations deal with the duty to segregate juvenile offenders from adult offenders.[44]

---

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

[43] *Id.*

[44] *Id.*

Singapore's reservation reads:

> The Republic of Singapore considers that articles 19 and 37 of the Convention do not prohibit –
>
> (a) the application of any prevailing measures prescribed by law for maintaining law and order in the Republic of Singapore;
>
> (b) measures and restrictions which are prescribed by law and which are necessary in the interests of national security, public safety, public order, the protection of public health or the protection of the rights and freedoms of others; or
>
> (c) the judicious application of corporal punishment in the best interest of the child.[45]

The relevant reservation for the Netherlands reads:

> The Kingdom of the Netherlands accepts the provisions of article 37 (c) of the Convention with the reservation that these provisions shall not prevent the application of adult penal law to children of sixteen years and older,

---

[45] *Id.*

provided that certain criteria laid down by law have been met.[46]

This is especially significant because, as we demonstrate *infra*, in the Netherlands "application of adult penal law" includes the possibility of the imposition of the sentence of life without parole. Thus, insofar as the reservation is concerned, the Netherlands has entered into the CRC with the understanding that it may sentence 16 and 17 year-olds to life in prison without parole if it chooses to do so as a matter of domestic policy.

2. The findings of the UN Committee on the Rights of the Child demonstrate widespread "violations" of Article 37

To sustain the argument that Article 37 has become a rule of customary international law it is also necessary for the International *Amici* to demonstrate that the actual practice of states reflects overwhelming obedience to its dictates.

Article 44 of the CRC requires every state party to submit compliance reports within two years of the entry into force of the treaty for that state and every five years thereafter. After the submission of the reports from the states, the Committee on the Rights of the Child issues "Concluding Observations" which detail the findings relative to that state's compliance with the duties under the CRC.

---

[46] *Id.*

It is important to review the findings of the Committee with respect to compliance with the dictates of Article 37. We segregate the findings into two categories: (a) violations regarding the use of the death penalty and life in prison without parole, and (b) other violations of Article 37 concerning the administration of juvenile justice. As will be apparent, insofar as the Committee is concerned, a nation violates the CRC if it either employs LWOP or allows for its use in its domestic law.

Findings by the Committee on the Rights of the Child

Juvenile Death Penalty and LWOP

Niger

Concerning Niger, in June of 2009, the CRC Committee "urged" this state to:

> Take immediate steps to halt and abolish by law imposition of death penalty and life sentence for crimes committed by persons under 18.[47]

---

[47] Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations: Niger, CRC/C/NER/CO/2, 18 June 2009, para. 81. (All such reports hereafter called "CRC Report".) For the ease of the Court's research, we strongly recommend http://tb.ohchr.org/default.aspx as the best source for UN reports.

The Netherlands

On March 27, 2009, the CRC Committee said:

> The Committee reiterates its concern that there is an increasing use of pre-trial detention for juveniles in the Netherlands, that there is still a possibility of 16 and 17 year-olds being tried under adult criminal law, and that 16 and 17 year olds can be convicted to life imprisonment in the Netherlands Antilles.[48]

Additionally, the Committee said: "The Committee recommends that the State party: Eliminate life imprisonment sentence of children."[49]

As previously noted, the Netherlands continues to maintain its reservation to the CRC which permits it to try and sentence 16 and 17 year-olds as adults, including the possibility of LWOP.[50]

Belize

The Committee's 2005 report for Belize makes the following pertinent comments:

---

[48] CRC Report: The Netherlands, CRC/C/NLD/CO/3, 27 March 2009, para. 77.

[49] *Id.* at para. 78

[50] CRC Report: Netherlands, CRC/C/NLD/3, 23 July 2008, Aruba page 106 (Para. 96) or Netherlands page 19 (para. 95)

> As regards life imprisonment of children without provision for parole, [the State should] bring its domestic laws into full conformity with the provisions and principles of the Convention.
>
> The Committee is deeply concerned about the fact that children as young as 9 years of age can be sentenced to life imprisonment without provision for parole.[51]

The following additional nations have been urged by the Committee[52] to conform their juvenile sentencing laws because they permit the use of the death penalty, LWOP, or life in prison for juvenile offenders:

- Bangladesh (reports of implementation of death penalty for those under 18 and LWOP for those under 15)[53]
- Burkina Faso (death penalty and LWOP)[54]

---

[51] CRC Report: Belize, CRC/C/15/Add.252, 31 March 2005,para. 70-71.

[52] We have used the most recent year for each nation listed. If the report is over five years old it is an indication that the nation is out of compliance with its reporting obligation. See, fn. 53 re Guatemala which uses its two most recent reports.

[53] CRC Report: Bangladesh, CRC/C/BGD/CO/4, 26 June 2009, para. 92.

- China (life imprisonment) [55]
- Dominica (LWOP)[56]
- Gambia (death penalty and LWOP)[57]
- Guatemala (death penalty and LWOP)[58]
- Jamaica (life imprisonment)[59]
- Japan (life imprisonment)[60]

---

[54] CRC Report:Burkina Faso, CRC/C/15/Add.193,9 October 2002, para. 60.

[55] CRC Report: China CRC/C/CHN/CO/2, 24 November 2005, para. 89

[56] CRC Report: Dominica, CRC/C/15/Add.238, 30 June 2004, para 46: "The Committee is concerned at the lack of juvenile courts and at the fact that children may be sentenced to a penalty at the "President's pleasure", to life imprisonment and to whipping in private."

[57] CRC Report: Gambia, CRC/C/15/Add.165, 6 November 2001, para. 68.

[58] CRC Report: Guatemala, CRC/C/15/Add.58, 7 June 1996, para. 47. Guatemala's most recent report in 2001 reads: "The Committee expresses its serious concern that its previous recommendation encouraging the reform of the juvenile justice system to ensure full compatibility with the principles and provisions of the Convention has not been implemented...." CRC/C/15/Add.154, 9 July 2001, para. 56.

[59] CRC Report: Jamaica, CRC/C/15/Add.210, 4 July 2003, 57(b).

[60] CRC Report: Japan, CRC/C/15/Add.231, 26 February 2004, para. 53.

- Liberia (death penalty and LWOP)[61]
- Saint Lucia (LWOP)[62]
- Saudi Arabia (possibility of death penalty)[63]
- Trinidad and Tobago (life imprisonment)[64]

3. Other significant violations of Article 37 are revealed by the UN Committee Reports

The report on Kenya in 2007 objects to the treatment of juveniles in detention. "[D]espite a clear prohibition in the legislation, reports of torture, cruel, inhuman and degrading treatment indicate that it still occurs."[65] Other concerns include "shooting at children," "rapes of girls by law enforcement agents" that were not investigated, and only "limited progress in achieving a functioning juvenile justice system outside the capital." Significantly, "although the death penalty is

---

[61] CRC Report: Liberia, CRC/C/15/Add.236, 1 July 2004, para. 68.

[62] CRC Report: Saint Lucia, CRC/C/15/Add.258, 21 September 2005, para. 72.

[63] CRC Report: Saudi Arabia, CRC/C/SAU/CO/2 17, March 2006, para. 32.

[64] CRC Report: Trinidad and Tobago, CRC/C/TTO/CO/2, 17 March 2006, para. 73.

[65] CRC Report: Kenya, CRC/C/KEN/CO/2, 19 June 2007, para. 32.

outlawed for children, according to some reports children are still being sentenced to death." [66]

Concerning Uruguay in 2007:

> The Committee is concerned over the high number of children deprived of liberty and over reports indicating cases of torture and degrading treatment by law enforcement officials of children while held in detention.[67]

Uruguay was also admonished to create a juvenile justice system.[68]

The report on Bulgaria in 2008 expressed concern over the numerous reports of children being ill-treated or tortured while in detention. Again, this nation was admonished to create an adequate system of juvenile justice.[69]

France, Italy, Germany, and United Kingdom

The International *Amici* focus special attention on these four western European nations in an attempt to demonstrate that the United States is out of compliance with their practices. However, the

---

[66] *Id.* at para. 32 and 67.

[67] CRC Report: Uruguay, CRC/C/URY/CO/2, 5 July 2007, para. 34.

[68] *Id.* at para. 67.

[69] CRC Report: Bulgaria, CRC/C/BGR/CO/2, 23 June 2008, para. 28 and 69(d).

proof they offer actually takes an interesting twist when the balance of Article 37's rules for juvenile sentencing is considered:

> No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time....

A decision of the Supreme Court of Appeal of South Africa demonstrates the extreme nature of these requirements from Article 37. *Director of Public Prosecutions, KwaZulu-Natal v. P* 2006 (3) SA 515 (SCA); [2006] 1 All SA 446 (SCA); 2006 (1) SACR 243 (SCA).

The Constitutional Court of South Africa wrote a summary of this decision:

> [A] twelve year old girl had paid two men to suffocate and then slit the throat of her grandmother, with whom she lived, after she had drugged her. For this act she had furnished the murderers with articles from the deceased's house and offered herself sexually to them. The trial Court had imposed a correctional supervision order, and the State had appealed to the Supreme Court of Appeal. After emphasising the significance of the United Nations Convention on the

> Rights of the Child (the CRC) and section 28 of the Constitution, the Supreme Court of Appeal partially upheld the appeal, concluding that correctional supervision on its own was not severe enough. It held that a sentence of seven years' imprisonment, entirely suspended on condition of P's compliance with a rigorous regime of correctional supervision, was more appropriate. In *P* it was held at para 19 that the Constitution and the international instruments did not forbid incarceration of children in certain circumstances, but merely required that the "'child be detained only for the shortest period of time'" and that the child be "'kept separately from detained persons over the age of 18 years'." The Supreme Court of Appeal noted that it was not inconceivable that some of the courts may be confronted with cases which required detention.[70]

The United Kingdom, Germany, France and Italy do not live up to the standard of Article 37(b) of the CRC. Detention may only be for cases of last resort and only for the shortest period of time possible in the interest of the child. A gruesome murder was not enough to warrant any jail time at all under the CRC, according to the South African courts.

---

[70] *M v. The State*, CCT 53/06 [2007] ZAAC 18 (Const. Ct. of S.A.), at p. 7. FN8.

The International *Amici* indicate that the maximum penalty in Germany for a juvenile offender is 10 years.[71] Italy's maximum penalty of 24 years, as indicated by the International *Amici*.[72] France, we are told by these *amici*, imposes a maximum of 16 to 20 years in prison for "juveniles under age 16."[73] This is an intriguing assertion. It leads one to wonder what the maximum penalty is for juveniles over the age of 16. The *amici* do not resolve this mystery in their brief.

It is clear that each of these nations is in violation of the juvenile sentencing standards of Article 37(b). These nations are not sentencing for the shortest period of time possible and only in cases of last resort. In fact, in its most recent report on the United Kingdom, the CRC Committee held the nation to be out of compliance with the CRC's rules on juvenile sentencing. "The number of children deprived of liberty is high, which indicates that detention is not always applied as a measure of last resort."[74]

In Great Britain, juvenile murderers are sentenced under the following provision (Powers of Criminal Courts (Sentencing) Act (U.K., 2000), c. 6, Section 90):

---

[71] Int'l *Amici* at 16.

[72] *Id.*

[73] *Id.*

[74] CRC Report: United Kingdom, CRC/C/GBR/CO/4, 20 October 2008, para. 39, 77, 78

> Where a person convicted of murder appears to the court to have been aged under 18 at the time the offence was committed, the court shall (notwithstanding anything in this or any other Act) sentence him to be detained during Her Majesty's pleasure.

This would appear to violate Article 37. The CRC committee entered a "concluding observation" regarding Nigeria in 1996 which reveals the violation:

> The Committee is also concerned that the provisions of national legislation by which a child may be detained "at Her Majesty's Pleasure" may permit the indiscriminate sentencing of children for indeterminate periods.[75]

The evidence derived from the Committee's reports in 2008-2009 indicates that it believes that virtually every nation that was reviewed in that period was in violation of Article 37's rules on juvenile sentencing.

In 2008 and 2009, the following nations were urged to ensure that their sentencing laws reflected the principle that "children are held in detention only as a last resort": France,[76] Niger,[77]

---

[75] CRC Report: Nigeria, CRC/C/15/Add.61, 30 October 1996, para. 21.

[76] CRC Report: France, CRC/C/FRA/CO/4, 11 June 2009, para. 97.

Mauritania,[78] Democratic Republic of Korea,[79] Malawi,[80] the Netherlands,[81] Moldova,[82] Chad,[83] Democratic Republic of the Congo,[84] United Kingdom,[85] Bhutan,[86] Djibouti,[87] Bulgaria,[88]

---

[77] CRC Report: Niger, CRC/C/NER/CO/2, 18 June 2009, para. 81.

[78] CRC Report: Mauritania, CRC/C/MRT/CO/2, 17 June 2009, para. 82.

[79] CRC Report: Democratic Republic of Korea, CRC/C/PRK/CO/4, para. 35.

[80] CRC Report: Malawi, CRC/C/MWI/CO/2, 27 March 2009, para. 76.

[81] CRC Report: The Netherlands, CRC/C/NLD/CO/3, 27 March 2009, para. 78.

[82] CRC Report: Moldova, CRC/C/MDA/CO/3, 20 February 2009, para. 73.

[83] CRC Report: Chad, CRC/C/TCD/CO/2, 12 February 2009, para. 86.

[84] CRC Report: Democratic Republic of the Congo, CRC/C/COD/CO/2, 10 February 2009, para. 93.

[85] CRC Report: United Kingdom, CRC/C/GBR/CO/4, 20 October 2008, para. 39, 77, 78.

[86] CRC Report: Bhutan, CRC/C/BTN/CO/2, 8 October 2008, para. 71.

[87] CRC Report: Djibouti, CRC/C/C/DJI/CO/2, 7 October 2008, para. 73.

[88] CRC Report: Bulgaria, CRC/C/BGR/CO/2/ 23 June 2008, para. 69.

Eritrea,[89] Georgia,[90] Sierra Leone,[91] Timor-Leste,[92] and Dominican Republic.[93] Some of these reports appear to be in the nature of admonition; others, like the one for the United Kingdom, are clear findings of present violations.

This is 18 of 24 countries reviewed in this two-year period. Sweden and Bangladesh were criticized for other sentencing violations. Bangladesh was chastised for the use of the death penalty and LWOP.[94] Sweden was condemned for the use of solitary confinement for juvenile offenders.[95] And the remaining four nations—Slovenia,[96] Tunisia,[97]

---

[89] CRC Report: Eritrea, CRC/C/ERI/CO/3, 23 June 2008, para. 78.

[90] CRC Report: Georgia, CRC/C/GEO/CO/3, 23 June 2008, para. 71.

[91] CRC Report: Sierra Leone, CRC/C/SLE/CO/2, 20 June 2008, para. 77.

[92] CRC Report: Timor-Leste, CRC/C/TLS/CO/1, 14 February 2008, para. 75.

[93] CRC Report: Dominican Republic, CRC/C/DOM/CO/2, 11 February 2008, para. 87.

[94] See, fn. 48 and accompanying text.

[95] CRC Report: Sweden, CRC/C/SWE/CO/4, 12 June 2009, para. 70.

[96] CRC Report: Slovenia, CRC/C/OPSC/SVN/CO/1, 23 July 2009.

[97] CRC Report: Tunisia, CRC/C/OPAC/TUN/CO/1, 6 February 2009.

Lithuania,[98] and Serbia[99]—were all reporting to the CRC for the first time.

Thus, in 2008-2009 every single nation was admonished regarding the practice of sentencing juvenile offenders—save for the four nations that were reviewed in truncated initial reports. The evidence from the United Nations itself reveals that compliance with the CRC's juvenile sentencing standards is the rare exception and not the rule.

C. Summary Re *Jus Cogens* and Customary International Law

The United States is not the only nation in the world that allows or practices sentencing juveniles to life without parole. At least 23 nations allow LWOP or life imprisonment when we combine the ten nations revealed in the brief of the International *Amici* with those revealed by the reports of the UN Committee on the Rights of the Child. These include the Netherlands, Japan, Australia, Argentina, and China. Belize allows children as young as nine to be sentenced to life without parole. Other nations continue to practice the juvenile death penalty.

Moreover, the *amici* have simply failed to supply this Court with reliable data to determine the actual sentencing laws of any nation other than France, Italy, Germany, and the United Kingdom. Yet these four nations are also in violation of the

---

[98] CRC Report: Lithuania, CRC/C/OPSC/LTU/CO/1, 16 October 2008.

[99] CRC Report: Serbia, CRC/C/SRB/CO/1, 20 June 2008.

standards of Article 37 relative to juvenile sentencing—the United Kingdom being formally castigated for this violation in its 2008 review by the U.N. Committee.

Jus cogens has no clear application outside the context of invalidating a treaty that violates some peremptory norm—if it can be finally determined how to recognize such a norm. Moreover, the theory that Article 37's sentencing rules comprise a rule of customary international law fails on both of the *opinio juris* factors. There has been no showing that the practice of States demonstrates widespread compliance with the sentencing standards of Article 37—in fact, the opposite has been demonstrated. And there is no proof that any nation, other than South Africa, feels legally obligated to impose the radical sentencing standards contained in the CRC.

The theory that the sentencing requirements of the CRC are mandatory upon this nation despite our refusal to ratify this treaty is without factual or legal foundation. Moreover, the argument of the International *Amici* that "the uniformity and consistency of international law and practice should inform this Court's Eight Amendment Analysis" simply cannot be sustained because the record of international law and practice is neither uniform nor consistent.

II. The United States is not in Violation of Any Binding Treaty Obligation by Sentencing Juveniles to Life in Prison

The International *Amici* contend that the United States is in violation of "several human rights treaties" to which it is a party. Brief at 24. They initially point to three treaties: International Covenant on Civil and Political Rights (ICCPR)[100], the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[101] (Torture Convention), and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).[102] This argument is without merit.

Both the ICCPR and the Torture Convention contain similar reservations:

ICCPR:

> That the United States considers itself bound by article 7 to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or

---

[100] 999 U.N.T.S. 171 (1966), ratified by the United States on June 8, 1992.

[101] 1465 U.N.T.S. 113 (1987), ratified by the United States on Oct. 21, 1994.

[102] 660 U.N.T.S. 195 (1966), ratified by the United States on Oct. 21, 1994.

> Fourteenth Amendments to the Constitution of the United States.[103]

Torture Convention:

> That the United States considers itself bound by the obligation under article 16 to prevent "cruel, inhuman or degrading treatment or punishment", only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.[104]

Accordingly, these treaties add nothing to this case. We have not agreed to anything in international law beyond obedience to our own Constitution. This Court need not plumb the depths of international law on these treaties because we have not agreed to adhere to any standard not already imposed by the Constitution.

With regard to the CERD treaty, the Senate made the following reservation: "[T]he United States declares that the provisions of the Convention are not self-executing."[105]

---

[103] United Nations Treaty Collection, Chapter IV, No. 4.

[104] United Nations Treaty Collection, Chapter IV, No. 9.

[105] United Nations Treaty Collection, Chapter IV No. 2.

This Court recently said: "A non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force." *Medellín v. Texas*, 552 U.S.__, 128 S. Ct. 1346, 1351 (2008).

Accordingly, the CERD treaty has no application in this case concerning the domestic law of the United States.

Finally, the International *Amici* contend that the United States is in violation of the "*corpus juris* of the Organization of American States of which the United States is a member."[106] Whatever implications can be drawn from the *corpus juris*, the United States is not a party to any O.A.S. treaty that has even arguable pertinence. The American Declaration of the Rights and Duties of Man, cited by these *amici*, is not a treaty. The Seventh Circuit made this plain:

> Similarly, the American Declaration of the Rights and Duties of Man, on which the Inter-American Commission relied, is merely an aspirational document that, in itself, creates no directly enforceable rights.

Garza v. Lappin, 253 F.3d 918, 823 (7th Cir. 2001).

The International *Amici* also cite the American Convention on Human Rights, which is an actual treaty. They fail to note, however, that the

---

[106] Int'l *Amici* at 19.

United States is not a party.[107] This nation is not bound by a treaty that it has not joined.

III. The Coerced Use of International Law Violates The Principle of Self-Determination

The International *Amici* implore this Court to follow the example of the Declaration of Independence in reaching its decision. With this idea, we fully agree. However, we respectfully suggest that the International *Amici* radically misunderstand the meaning of the Declaration and its applicability to this case.

The International *Amici* attempt to make much of Jefferson's phrase: "a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation." This does not mean, as the *amici* suggest, that the Declaration's signers employed international law to reach their decision to throw off the shackles of bondage. The whole point of the Declaration was that the American people were finished with the idea of being governed by others from across the sea.

The preceding phrase is the most pertinent. The United States were to "assume among the powers of the earth, the *separate and equal* station to which the Laws of Nature and Nature's God entitle them."

---

[107] Brownlie at 571. See also, *Treaties in Force as of January 1, 2009*, United States Department of State.

The basis for our independence was not international law but natural law. And the fundamental purpose of the document was to tell the other nations of the world that we were separate from them and equal to them. Good diplomatic sense says that we would explain our actions to other nations. However, this document stands for the exact opposite of the proposition that America should be governed by the laws and rules of other nations.

It is nearly unthinkable that an array of international organizations would file a brief in this Court arguing that the United States is bound by the Convention on the Rights of the Child, a treaty that it has not agreed to, on the basis of the cumulative effect of the laws of the rest of the world. But the unthinkable becomes bizarre when these *amici* claim that the Declaration of Independence supports this proposition.

We respectfully suggest that the International *Amici* are asking this Court to take action that would violate one of the most fundamental principles of international law. "The right of peoples to self-determination" is one of the principles that most commentators agree falls within the doctrine of *jus cogens.*[108]

The coerced use of international law on an unwilling nation is in itself a violation of a peremptory norm of human rights. Article I Section 1 and the 10th Amendment of our Constitution

---

[108] Kadelbach, *supra* at 27. Brownlie at 511.

contain the most important principles. All law-making power for the American people rests in the Congress of the United States, the several states, or the people themselves.

CONCLUSION

For the foregoing reasons the decisions below should be affirmed.

Respectfully submitted this 21st day of September, 2009.

Michael P. Farris
Counsel of Record
Patrick Henry College
One Patrick Henry Circle
Purcellville, VA 20132
(540) 338-8712

AMICUS CURIAE BRIEF

Nos. 08-7412, 08-7621

IN THE

Supreme Court of the United States

TERRANCE JAMAR GRAHAM,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

JOE HARRIS SULLIVAN
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Writs of Certiorari to the District Court of Appeal of Florida, First District

BRIEF FOR SOLIDARITY CENTER FOR LAW AND JUSTICE, THE SOVEREIGNTY NETWORK, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

STEVEN GROVES
THE SOVEREIGNTY NETWORK
915 E St NW
Washington, DC 20004

JAMES P. KELLY, III*
SOLIDARITY CENTER FOR LAW AND JUSTICE, P.C.
Five Concourse Parkway
Suite 200
Atlanta, Georgia 30328
(678) 231-1209

* *Counsel of Record*

Counsel for Amici Curiae

[Additional *Amici* Listed on the Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Additional *Amici*:

Americans United for Life

Catholic Family and Human Rights Institute

Center for Security Policy

Concerned Women for America

Family Advocacy International

Family Watch International

Freedom Alliance

Hudson Institute

The Cato Institute

The Competitive Enterprise Institute

United Families International

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. REFERRING TO NON-BINDING TREATY PROVISIONS OR AN INSUFFICIENTLY DEFINITE INTERNATIONAL NORM AS A BASIS FOR DETERMINING WHETHER FLORIDA'S SENTENCING OF JUVENILES TO LIFE WITHOUT PAROLE VIOLATES THE EIGHTH AMENDMENT WILL UNDERMINE THE DEMOCRATIC PROCESS AND RULE OF LAW	4
A. Florida's Public Officials, its Juvenile Justice Advocacy Groups, and Concerned Florida Citizens Should Be Permitted to Continue to Utilize the Democratic Process to Address the Problem of Increased Youth Violence in Their State	5
B. Neither Non-Binding Treaty Provisions Nor an Insufficiently Definite International Norm Regarding the Sentencing of Juveniles to Life Without Parole Should Serve as a Basis for Determining Whether Florida Juvenile Life Without Parole Sentencing Laws Violate the Eighth Amendment to the United States Constitution	10

TABLE OF CONTENTS

Page

II. REFERRING TO NON-BINDING TREATY PROVISIONS OR AN INSUFFICIENTLY DEFINITE INTERNATIONAL NORM AS A BASIS FOR DETERMINING WHETHER FLORIDA'S SENTENCING OF JUVENILES TO LIFE WITHOUT PAROLE VIOLATES THE EIGHTH AMENDMENT WILL CREATE UNCERTAINTY ABOUT A MULTITUDE OF U.S. DOMESTIC LAWS 23

III. CONCLUSION 35

APPENDIX

Interests of *Amici* 1a

TABLE OF AUTHORITIES

CASES — Page

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) 18
Conroy v. Aniskoff, 507 U.S. 511 (1993) 28
Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) ..... *passim*

CONSTITUTION

U.S. Const. Amend. V 14, 15
U.S. Const. Amend. VIII ..... *passim*
U.S. Const. Amend. XIV 14, 15

STATUTES

Alien Tort Statute, 28 U.S.C. § 1350 (1789) 2, 12, 13
Civil Rights Act of 1871, 42 U.S.C. § 1983 (1871) 18
U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (April 2, 1992) 14, 15, 16, 34

BILLS

Florida Second Chance for Children in Prison Act of 2009, SB 1430 (2009) 7
Juvenile Justice Accountability and Improvement Act of 2009, H.R. 2289 (2009) 8

RULES

Supreme Court Rule 37.2(a) 1

TABLE OF AUTHORITIES—Continued

TREATIES

Convention on the Elimination of All Forms of Discrimination against Women, 1249 U.N.T.S. 13, Dec. 18, 1979, http://www2.ohchr.org/english/law/cedaw.htm ... 29, 30
International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, Dec. 21, 1965, http://www2.ohchr.org/english/law/cerd.htm 31, 32
International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, Dec. 16, 1966, http://www2.ohchr.org/english/law/ccpr.htm..... *passim*
International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, Dec. 16, 1966, http://www2.ohchr.org/english/law/cescr.htm 29
United Nations Convention on the Rights of the Child, 1577 U.N.T.S. 3, Nov. 20, 1989, http://www2.ohchr.org/english/law/crc.htm..... *passim*

UNITED NATIONS DOCUMENTS

Commission on Human Rights, Working Party session, UN Doc. E/CN.4/1989/48 (1989)..... 20
Committee on Economic, Social and Cultural Rights, The Right to Water, General Comment No. 15, U.N. Doc. E/C.12/2002/11 (2002)..... 29

TABLE OF AUTHORITIES—Continued

Page

Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, CERD/C/USA/CO/6 (Feb. 2008) 32

Concluding Observations of the Human Rights Committee: United States of America, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 2006) 33

Universal Declaration of Human Rights, A/RES/217, Dec. 10, 1948, http://usgovinfo.about.com/bldechumanrights.htm 13, 14

OTHER AUTHORITIES

Blueprint Commission of the State of Florida, *Getting Smart About Juvenile Justice in Florida: Report of the Blueprint Commission* (2008) 7

Federal Bureau of Investigation, *Crime in the United States 2008* (2009), http://www.fbi.gov/ucr/cius2008/index.html 5

Florida Department of Juvenile Justice, *Five Year Juvenile Delinquency Trends and Conditions* (2009), http://www.djj.state.fl.us/Research/Trends.html 5

Andrew Grossman & Charles Stimson, *Adult Time for Adult Crimes: Life Without Parole for Juvenile Killers and Violent Teens* (2009) 9

Steven Groves, *The Inequities of the U.N. Committee on the Elimination of Racial Discrimination*, The Heritage Foundation (2008) 33

TABLE OF AUTHORITIES—Continued

Page

International Women's Rights Action Watch, *Producing Shadow Reports to the CEDAW: A Procedural Guide* (2009) 31

James Kelly, *The Matrix of Human Rights Governance Networks*, 9 Engage, Issue 1, 118 (2008) 29

Donald Kochan, *Sovereignty and the American courts at the Cocktail Party of International Law: The Dangers of Domestic Judicial Invocations of Foreign and International Law*, 29 Fordham International Law Journal ___ (2006) 28

Donald Kochan, *The Political Economy of the Production of Customary International Law: The Role of NGOs and United States Courts*, 22 Berkeley Journal of International Law, No. 2, 275 (2004) 24, 31

Mattias Kumm, *Constitutional Democracy Encounters International Law: Terms of Engagement, New York University Public Law and Legal Theory Working Papers*, Paper 47 (2006) 8, 28

John McGinnis, *Foreign to Our Constitution*, 100 Northwestern University Law Review, No. 1, ___ (2006) 9, 19

John McGinnis & Ilya Somin, *Should International Law be Part of Our Law?*, 59 Stanford Law Review, No. 5, 1175 (2007) 10, 11

TABLE OF AUTHORITIES—Continued

Page

Helmut Sax & William Schabas, *A Commentary on the United Nations Convention on the Rights of the Child: Article 37 Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (2006) 20

Jonathan Turley, *Dualistic Values in the Age of International Jurisprudence*, 44 Hastings L.J. 185 (1993) 22

STATEMENT OF INTEREST

Americans United for Life, Catholic Family and Human Rights Institute, Center for Security Policy, Concerned Women for America, Family Advocacy International, Family Watch International, Freedom Alliance, Hudson Institute, Solidarity Center for Law and Justice, The Cato Institute, The Competitive Enterprise Institute, The Sovereignty Network, and United Families International hereby request that this Court consider the present brief pursuant to Sup. Ct. Rule 37.2(a) in support of Respondent. The interests of *amici* are described in detail in the Appendix.[1]

The consideration and adoption of state and federal laws and policies relating to the sentencing of juveniles for the crimes that they commit is an essential undertaking in a democratic society. The United States Congress and the overwhelming majority of states have adopted laws permitting juvenile offenders to be sentenced to life in prison without the possibility of parole. These laws reflect the will of the people and were enacted after due consideration of the nature of, and threats posed by, juvenile criminal activity in modern America, as well as the possibilities for the rehabilitation of juvenile offenders. For this reason, given their steadfast commitment to the democratic process, the rule of law, and national sovereignty, *amici* urge this Court, in deciding this case, not to consider the non-binding provisions of in-

---

[1] Letters from all counsel consenting to its filing are being sent with this brief to the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

ternational human rights treaties or an insufficiently definite international norm regarding the sentencing of juveniles to life without parole.

SUMMARY OF ARGUMENT

In the present cases, the citizens of the State of Florida adopted laws through the democratic process that permit the sentencing of juveniles to life in prison without the possibility of parole. By referencing non-binding provisions of international human rights treaties or an international norm regarding the sentencing of juveniles to prison without the possibility of parole as a basis for deciding whether Florida law violates the Eighth Amendment's clause prohibiting cruel and unusual punishments, this Court risks undermining the democratic process and the rule of law and creating uncertainty about a multitude of U.S. domestic laws.

This Court should only allow international law to override domestic law in those cases where the former has been ratified by the domestic political process. If this Court determines otherwise, then, in deciding whether to refer to a purported international norm as a basis for constitutional interpretation, this Court should apply the same test it recently used to determine whether an international norm prohibiting arbitrary arrest and detention could serve as a basis for creating a federal common law claim under the Alien Tort Statute. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Specifically, this Court should determine whether the international norm relating to the sentencing of juveniles to life without parole is sufficiently definite to be used as a basis for constitutional interpretation. This test, which was used in by the Court in *Sosa* to determine whether, in the absence of statutory authority for a cause of

action, an international norm can be used to create a federal common law action, is no less appropriate in the present cases, where this Court must decide whether to use a purported international norm to overturn existing domestic statutes that have been enacted at the state and Federal levels.

Applying the "defined with specificity" test, there is little doubt that no sufficiently definite international norm exists that can serve as a basis for determining that the Florida juvenile life without parole sentencing law violates the Eighth Amendment. The international norm relating to sentencing juveniles to life without parole has not attained the status of customary law because: 1) there is only general, "high-level" authority cited for the norm; 2) the implications of enforcing such a broad norm are "breathtaking;" 3) enforcement of the norm would supplant United States domestic laws; and 4) there is a lack of a factual basis for determining which juvenile life without parole policies violate the law of nations with the certainty comparable to that afforded by Blackstone's three common law offenses (violations of safe conducts, infringement of the rights of ambassadors, and piracy).

If this Court relies on a non-binding provision of an international treaty or an insufficiently definite international norm to overturn Florida juvenile life without parole sentencing laws and, consequently, comparable Federal law and laws in over 40 states, serious questions will arise regarding the long-term viability of the democratic process and rule of law. Additionally, uncertainty will be created about a multitude of other U.S. domestic laws relating to human rights.

ARGUMENT

I. REFERRING TO NON-BINDING TREATY PROVISIONS OR AN INSUFFICIENTLY DEFINITE INTERNATIONAL NORM AS A BASIS FOR DETERMINING WHETHER FLORIDA'S SENTENCING OF JUVENILES TO LIFE WITHOUT PAROLE VIOLATES THE EIGHTH AMENDMENT WILL UNDERMINE THE DEMOCRATIC PROCESS AND RULE OF LAW

The citizens of the State of Florida have adopted laws through the democratic process that permit the sentencing of juveniles to life in prison without the possibility of parole. They did so after taking into consideration trends in juvenile crime and after weighing different options regarding the incarceration of juveniles and the likelihood for rehabilitation that would enable them to serve as functioning citizens in their later lives.

Although it is important for this Court to evaluate whether Florida juvenile sentencing laws violate the Eighth Amendment's clause prohibiting cruel and unusual punishments, this Court should refrain from considering, citing, or otherwise referencing non-binding provisions of international treaties or an insufficiently definite international norm as a basis for its decision. Doing so would undermine the democratic process in Florida and across the United States and create a great deal of uncertainty regarding the continued validity of laws relating to a multitude of human rights.

A. Florida's Public Officials, its Juvenile Justice Advocacy Groups, and Concerned Florida Citizens Should Be Permitted to Continue to Utilize the Democratic Process to Address the Problem of Increased Youth Violence in Their State.

Juvenile crime is a significant problem in the United States. In 2008, persons under the age of 18 committed 11.9% of the 459,553 violent crimes and 18.4% of the 1,306,464 property crimes cleared by law enforcement officials. Federal Bureau of Investigation, Table 28. In Florida, murder/manslaughter referrals in the case of juvenile offenses increased 55%, from 84 referrals during fiscal year 2003-2004 to 130 referrals during fiscal year 2007-2008. During the same period, attempted murder/attempted manslaughter referrals increased 50%, from 46 to 69 and armed robbery referrals increased 103%, from 708 to 1,434. Florida Department of Juvenile Justice 1.

Despite these discouraging statistics, since 1994, Florida citizens have dutifully examined their juvenile justice system and pursued necessary reforms. Florida elected officials, state juvenile justice officials, business leaders, juvenile justice policy advocates, human rights advocates, education leaders, youth representatives, parents of detained juveniles, and victims' rights organizations have participated in these democratic deliberations.

- The Juvenile Justice Act of 1994 created the Florida Department of Juvenile Justice, which is responsible for planning and managing all programs and services in the juvenile justice system.

- In 1994, the Florida Juvenile Justice Association was created. The Association promotes public awareness and education on juvenile justice issues; contributes to the development of public policy regarding juvenile justice issues; supports evaluation and research of juvenile justice issues; and provides training, technical assistance and consultation to Association members and related parties.
- Since 1999, the National Council of Juvenile and Family Court Judges ("NCJFCJ") has conducted 74 training sessions in Florida for more than 12,500 judges, magistrates, commissioners, attorneys, and other juvenile and family court-related professionals. The training activities were undertaken by the NCJFCJ over the past ten years to support and enhance widespread systemic reforms and facilitate the achievement of better outcomes for Florida's children and families. As of 2009, NCJFCJ has 64 members in Florida out of a nationwide membership of over 1,900.
- In 2000, the Florida Juvenile Justice Foundation, Inc. was formed to serve as a Direct Support Organization for the Florida Department of Juvenile Justice. Among other things, the Foundation fosters collaboration among business people, community members, parents, youths and Florida's juvenile justice system.
- In July 2007, Florida Governor Charlie Crist authorized creation of a Blueprint Commission as a time-limited workgroup charged with developing recommendations to reform Florida's juvenile justice system. The Blue-

print Commission's 25 members traveled the state, held public hearings, and received testimony from a host of stakeholders—community leaders, law enforcement and court officers, representatives of the public school system, health and mental health officials, parents, youth, advocates, national experts in juvenile justice, and department staff.

- In January 2008, after conducting a thorough examination of the state of juvenile justice in Florida, the Blueprint Commission produced its report, *Getting Smart About Juvenile Justice in Florida*. Working with expert advisors, the members of the Commission, consisting of representatives from law enforcement, civil and human rights, education, juvenile justice, and business organizations, identified 52 recommendations for change, organized under seven guiding principles and 12 key goals designed to be implemented over multiple years.
- During the 2009 session of the Florida House of Representatives, several representatives introduced House Bill 757, the Second Chance for Children in Prison Act of 2009. The Act, which was never passed out of committee, provided that an offender 15 years of age or younger who is sentenced to life or more than 10 years in prison is eligible for parole if he or she has been incarcerated for a minimum period and has not previously been convicted or adjudicated of, or had adjudication withheld, for certain offenses.

Perhaps, after further deliberation among Florida citizens and their duly elected representatives, HB 757 will become law and, perhaps, in the future, the sentencing of juveniles to life without parole will no longer be a part of the Florida legal landscape. It is also possible that Florida's elected officials serving in the United States House of Representatives will choose to support H.R. 2289, the Juvenile Justice Accountability and Improvement Act of 2009. H.R. 2289, introduced on May 6, 2009, is designed to establish a meaningful opportunity for parole or similar release for juvenile offenders sentenced to life in prison.

This Court should respect the democratic process as it is unfolding in Florida, other states, and in the United States Congress. It should resist the urge to refer to the provisions of non-binding international treaties or an insufficiently definite international norm to overturn a majority of state and federal laws relating to the sentencing of juveniles to life without parole. State officials enacted these laws to address valid concerns regarding increases in juvenile offenses and are reviewing their merit in light of sentencing outcomes. When it comes to fashioning juvenile justice solutions with an eye toward human rights concerns, "there is no reason to think that national institutions in a constitutional democracy are unfit to ultimately and authoritatively determine these rules for themselves." Kumm 23-24.

Florida has unique historic, public safety, legal, development, cultural, economic, political, and social concerns relating to the issues of youth violence and juvenile justice. There have been, and will be, regular opportunities for meaningful participation among the various stakeholders involved in the issue of juvenile

life without parole sentencing. Florida citizens can hold elected and other public officials accountable for failed or unjust juvenile justice policies.

Due to the relatively violent nature of American society, the United States and the State of Florida have been at the vanguard dealing with the issues of youth violence and juvenile justice. Few, if any, other developed nations and their political subdivisions have had to address these issues to the same extent and in the same context as has been the case in the United States, in general, and Florida, in particular. Meanwhile, in at least eleven countries, including Australia, the life without parole sentence is available with respect to juveniles. Also, many countries allow sentences of long durations for juvenile offenders. Other countries have agreed to prohibit the sentence, but have not done so in practice. Grossman and Stimson 39.

The fact that high-level government officials from foreign countries have ratified international human rights treaties that contain vague provisions relating to the sentencing of juveniles provides scant evidence that their citizens have seriously considered the merits of such prohibitions in a context comparable to that which exists in Florida and the United States. "International law, both formally and practically, represents the consensus of states, not people, and thus there is much less reason to think it should trump or even cast doubt on the judgments reached by democratic deliberations in particular nations." McGinnis 312.

B. Neither Non-Binding Treaty Provisions Nor an Insufficiently Definite International Norm Regarding the Sentencing of Juveniles to Life Without Parole Should Serve as a Basis for Determining Whether Florida Juvenile Life Without Parole Sentencing Laws Violate the Eighth Amendment to the United States Constitution.

This Court should only allow international law to override domestic law in those cases where the former has been ratified by the domestic political process. Under a modern conception of international custom, many scholars embrace a methodology that permits substantial human rights norms to be encompassed within customary international law. Instead of requiring that nation-states actually engage in a practice, they substitute statements by nation-states that give the norms verbal endorsement. These include resolutions of the General Assembly of the United Nations and multilateral treaties. Under the modern conception, "customary international law suffers from a democracy deficit and is therefore likely to produce lower quality norms than a democratic domestic political process." McGinnis and Somin 1201.

This democracy deficit is created by: 1) the large role played by unrepresentative and unaccountable "publicists," including elite international law professors and non-governmental organization leaders in the United States, who determine what level of practice is required to support an international norm; 2) the non-democratic governments that participate in the negotiation of international human rights treaties; 3) the failure of democratic nations to

voluntarily incorporate the international norms to displace their domestic laws; and 4) the inability of uninformed citizens to monitor or control the individuals and institutions responsible for international law fabrication, which exacerbates the potential for interest group influence and manipulation by elites. *Id.* 1202-1211.

To avoid this democracy deficit, this Court should leave it to the political branches to decide whether to incorporate international law into domestic law through the ordinary legislative processes that ensure democratic control over lawmaking. "In holding open the possibility that judges may create rights where Congress has not authorized them to do so, the Court countenances judicial occupation of a domain that belongs to the people's representatives." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 747 (2004) (Scalia, J., concurring in part and concurring in the judgment).

If, however, this Court is inclined to rely on international law as a basis for deciding these cases, it should use the test recently employed by the Court in *Sosa* to determine whether to recognize private claims under federal common law for violations of an international norm.

In *Sosa*, the Court explained that it is limited in its ability to recognize international law norms to create substantive rights that can give rise to private claims under federal law:

> We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity. . . . Several times,

> indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing.

Id., at 728, *citing*, 138 Cong. Rec. 8071 (1992). Yet, in certain limited cases, even without relying on the provisions of international human rights treaties, independent judicial recognition of actionable international norms is possible: "[F]ederal courts should not recognize private claims under federal common law for violations of any international law norm with less than definite content and acceptance among civilized nations than the historical paradigms familiar" when the jurisdictional statute giving rise to such violations was enacted. *Id.* at 732.

Thus, in *Sosa*, the Court held that the Alien Tort Statute authorized federal courts to recognize federal common law causes of action based on an international law norm only if the norm in question is "defined with specificity" comparable to the historic law of nations norms.

The "defined with specificity" test is designed to make certain that the international opinion and practices that give rise to the norm are rooted in facts and policies that have been developed, agreed upon, and implemented at the national level. That is, the international norm must manifest a solidarity achieved through respect for the subsidiarity principle. It is not enough that the "international community" recognizes the norm. Instead, there must be evidence that the norm is universally recognized due to the fact that it has attained such status as a result of

actual democratic discourse, deliberation, and development.

Under the "defined with specificity" test, the Court first considers whether the United States is obligated to respect the international norm under any applicable international human rights declaration or treaty. If a declaration consists only of a statement of principles, no such obligation exists. If, in ratifying a treaty, the United States made reservations that make the international norm inapplicable, no such obligation exists. In the absence of any binding declaration or treaty provision, there is no evidence that the norm has been adopted through the democratic process as manifested in the approval of the U.S. Senate by at least two-thirds of its members. In such cases, the Court then considers whether, regardless of the lack of a binding declaration or treaty provision, the international norm has attained the status of binding customary international law. If the international norm consists of a general prohibition with limited specificity as to its content, authority must be cited that "a rule so broad has the status of a binding customary norm today." *Id.*, at 736.

In *Sosa*, the Court considered whether the international norm prohibiting arbitrary arrest and detention was sufficiently definite to support a cause of action under the Alien Tort Statute. First, the Court rejected the claim that two international human rights agreements to which the United States is a party provided definite content regarding the scope of the norm. It dismissed as having little utility the prohibition against arbitrary arrest contained in the Universal Declaration of Human Rights (the "Declaration") and a similar prohibition contained in the International Covenant on Civil and Political Rights

(the "ICCPR"). The Court determined that "the Declaration does not of its own force impose obligations as a matter of international law," instead sharing Eleanor Roosevelt's view that the Declaration constitutes "a statement of principles . . . setting up a common standard of achievement for all peoples and nations." *Id.*, at 734 (citation omitted). As for the ICCPR, the Court determined that, although the treaty binds the United States as a matter of international law, the United States "ratified the ICCPR on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts." *Id.*, at 735. As a result, the Court rejected the assertion that the Declaration and ICCPR themselves established the relevant and applicable rule of international law.

Similarly, in the present case, the United States' reservations to the ICCPR effectively counter any claims that specific articles of the ICCPR provide the definite content necessary to prohibit the sentencing of juveniles to life without parole, a right not specifically contained in the ICCPR.

Article 7 of the ICCPR contains a general prohibition on "cruel, inhuman or degrading treatment or punishment" without defining or further elaborating upon the meaning of the phrase. As it turns out, the United States submitted a reservation to Article 7 specifying that the United States would only be considered bound by that provision "to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." As a result, Article 7 (to the extent executed) cannot impose any additional obligations

on the United States beyond those already required by the Fifth, Eighth, and Fourteenth Amendments, none of which has been interpreted to prohibit sentencing juveniles to life without parole.

Whether Article 7's prohibition on "cruel, inhuman or degrading treatment or punishment" would encompass the sentencing of a juvenile to life without parole remains an open question, a question that is debated every four years when the U.S. submits its report to the United Nations Human Rights Committee, which oversees the implementation of the ICCPR. As concerns the domestic law of the United States, however, the question is moot because of the reservation and the treaty's non-self-executing status.

Claims that Articles 10 and 14 of the ICCPR prohibit such sentences are likewise unsupported. Article 10(3), which addresses permissible conditions of confinement, declares, "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation." Article 14 does not deal with sentencing or conditions of confinement, but rather addresses criminal procedure. Specifically, regarding juveniles, it states, "In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation."

As with Article 7, the United States entered a specific reservation regarding Articles 10 and 14, expressly reserving "the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of article 10 and paragraph 4 of article 14." Moreover, to make clear to the Human Rights Committee and the other ICCPR States Parties regarding U.S. views concern-

ing incarceration, the United States entered a separate understanding that states: "The United States further understands that paragraph 3 of Article 10 does not diminish the goals of punishment, deterrence, and incapacitation as additional legitimate purposes for a penitentiary system."

Read together, these reservations and understandings eviscerate the argument that either Article 10 or Article 14 obliges the United States to cease sentencing juveniles to life imprisonment without parole. Notwithstanding any broad interpretation of the text of these articles, the United States' reservation contemplates that juveniles may be tried and sentenced the same as adults under "exceptional circumstances," presumably for heinous crimes such as murder and other violent felonies, and that they may be imprisoned for the purposes of "punishment, deterrence, and incapacitation," all of which are significantly furthered by the sentence of life without parole.

In *Sosa*, once the Court established that the United States was not obligated to adhere to any prohibition against arbitrary arrest contained in an international declaration or treaty to which it was a State Party, the Court considered whether the prohibition of arbitrary arrest had independently attained the status of binding customary international law. In doing so, it focused on whether the norm constituted a binding customary rule with specificity as to content, or, to the contrary, merely expressed an aspiration that this Court could not rely upon in "[c]reating a private cause of action to further that aspiration . . . ." *Id.*, at 738.

In *Sosa*, the respondent Alvarez invoked a general prohibition of "arbitrary" detention defined as offi-

cially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances. For several reasons, the Court determined that such a norm was too broad and indefinite to attain the status of binding customary law. It focused on the fact that only "high-level" general authority was cited as the basis for the norm; the "breathtaking" implications of enforcing the norm; the fact that enforcement of the norm would supplant domestic law; and the lack of a factual basis for determining which policies cross the line into an arbitrary arrest with the certainty afforded by the three common law offenses of violations of safe conducts, infringement of the rights of ambassadors, and piracy.

First, the Court noted that Alvarez cited little authority that a rule against arbitrary arrest has the status of a binding customary norm, explaining that a survey of national constitutions on which he relied as evidencing adherence to the norm "does show that many nations recognize a norm against arbitrary detention, but that consensus is at a high level of generality." *Id.*, at 736 n.27. If, instead of a survey pertaining to national constitutions, Alvarez had cited a survey of actual laws passed at the state level through democratic consideration of the issue, the Court may have found a more definite norm that rose to the level of customary international law.

Second, the Court considered the implications of a general prohibition on arbitrary arrest, regardless of the circumstances of the arrest. The Court noted that the rule proposed by Alvarez would support a cause of action in federal court "for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would

create a cause of action for any seizure of an alien in violation of the Fourth Amendment . . . ." *Id.*, at 736.

Third, the Court considered the effect that adoption of the norm would have on United States domestic law relating to arbitrary arrest, noting that it would create a cause of action "supplanting the actions under . . . 42 U.S.C. §1983 and *Bivens v. Six Unknown Fed. Narcotics Agents* . . . that now provides remedies for such violations." *Id.*, at 736-37. Such a broad rule would create an action in federal court for arrests made by state officers who simply exceed their authority; and for the violation of any limit that the law of any country might place on the authority of its own officers to arrest.

Finally, the Court explained that "[a]ny credible invocation of an international norm that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive authority." *Id.*, at 737. The mere reference to a general norm against arbitrary arrest provides no factual basis for determining which "policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race." *Ibid.* In short, the norm had not been developed through practical experiences considered and addressed within the democratic process. In this regard, it is an especially formidable task for judges to consider the factual underpinnings of an international norm.

> To understand whether a foreign law casts doubt on the wisdom of our own law, one would have to undertake a systematic comparative enterprise of the two different cultures and legal systems to determine whether the other legal culture had sufficiently good methods of rule generation, and

> whether the systems were sufficiently alike that it made sense to conclude that the difference between their rules and ours on an issue cast doubt on the beneficience of ours. The question is not strictly a legal one but demands comparative cultural sociology as well as comparative law.

McGinnis 325.

Because, as was the case in *Sosa* with respect to arbitrary arrest, in the present case, the United States is not bound by any limits on the sentencing of juveniles to life without parole that is contained in an international declaration or treaty to which it is a party, it is necessary to determine whether such an international norm has been defined with the level of specificity required by the Court to be considered customary international law. Just as the international norm prohibiting arbitrary arrest was not sufficiently definite to attain the status of a binding customary norm that could be used to create a federal remedy, the international norm relating to the sentencing of juveniles to life without parole is not sufficiently definite to attain the status of a binding customary norm that can be used by this Court to interpret whether such a sentence violates the Eighth Amendment.

Application of the same test used by the Court in *Sosa* supports that conclusion. In essence, the international norm prohibiting the sentencing of juveniles to life without parole has not attained the status of binding customary law because: 1) there is only general, "high-level" authority cited for the norm; 2) the implications of enforcing such a broad norm are "breathtaking;" 3) enforcement of the norm would supplant United States domestic laws; and 4) there is

a lack of a factual basis for determining which juvenile life without parole policies violate the law of nations with the certainty comparable to that afforded by Blackstone's three common law offenses.

First, there is only general, "high-level" authority for the international norm relating to the sentencing of juveniles to life without parole. The primary authority for the norm is contained in Article 37(a) of the United Nations Convention on the Rights of the Child ("CRC"), a treaty to which the United States is not a party.

Article 37(a) of the CRC provides that:

> States Parties shall ensure that:
>
> (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

UN Convention on the Rights of the Child, Art. 37(a). During the drafting stages of Article 37(a), in late 1988, a special Working Party session of the Commission on Human Rights reported that there was a lack of consensus on whether Article 37(a) should contain a blanket prohibition on both capital punishment and life imprisonment without the possibility of release. As explained by a leading commentary on Article 37(a), although, at the time of the report, the prohibition of torture and of capital punishment for juveniles could hardly be contested as norms of existing human rights treaty law, "the reference to life imprisonment was very much a matter of progressive development of the law, and no prior text existed on this subject." Sax and Schabas 10.

Thus, at the time of the adoption of the CRC in 1989 and its entering into force in 1992, there was no evidence of the existence of an international consensus as to whether, and under which circumstances, sentencing juveniles to life without parole violated the law of nations. Other than the general, high-level authority contained in Article 37(a), the main authorities cited for the international norm prohibiting the sentencing of juveniles to life without parole are a myriad of United Nations resolutions and many national constitutions. The citing of such general, high-level authorities for an international norm against the sentencing of juveniles to life without parole suffers the same democratic deficiency as did the general, high-level authority cited for the international norm on arbitrary arrest in *Sosa*.

Second, the implications of enforcing such a broad norm would be, according to the analysis in *Sosa*, "breathtaking." If this Court enforced Article 37(a) of the CRC, the sentencing of *any* juvenile to life without parole anywhere in the United States would be completely prohibited, regardless of the heinous nature of the crime; whether the juvenile was a repeat, violent offender; the age and maturity level of the offender; the proven psychological or other anti-social disposition of the offender; the degree of violent crimes being committed by juveniles in that particular state; the failure to rehabilitate prior similar offenders outside of the correctional system; or the conditions of lifetime confinement.

Third, the enforcement of such a broad, indefinite norm relating to the sentencing of juveniles to life without parole would supplant and overturn laws permitting such sentencing in over 40 U.S. states and at the federal level, which flies in the face of the

democratic process. Such an action would not comport with the traditional view of international law within the U.S. legal system. "International law is a system of treaties, agreements, and customs created in large part outside this representative system, untested by the pluralistic forces that drive the legislative and executive branches. The use of international sources introduces new players and new forms of "legislation" into the carefully balanced Madisonian system." Turley 193.

Finally, there is a lack of a factual basis for determining which juvenile life without parole policies violate the law of nations with the certainty comparable to that afforded by Blackstone's three common law offenses of violations of safe conducts, infringement of the rights of ambassadors, and piracy. Obviously, for a norm relating to the sentencing of juveniles to life without parole to attain a level of definiteness that would give rise to customary international law, consideration would have to be given at the national level to the question of which crimes committed by juvenile offenders warrant such sentencing. This is the factual determination in which this Court is engaged in the present cases and, in deciding these cases, this Court should not rely in whole or in part on an international norm that has not itself been developed on a similar factual basis.

In short, the purported international norm prohibiting the sentencing of juveniles to life without parole suffers the same defect expressed by the Court in relation to the purported international norm advanced by Alvarez in *Sosa*; "in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require." *Id.*, at 738.

By relying on an insufficiently definite international norm as a basis for determining whether the juvenile life without parole sentence violates the Eighth Amendment, this Court would be condoning an outcome similar to the one specifically rejected in *Sosa*—the recognition of a federal common law cause of action based on an international norm that was "created" at a general, high-level; that has broad implications for American jurisprudence; that supplants domestic laws enacted through the democratic process; and that has not been generated with consideration for the facts which would dictate a more specific, narrowly-tailored policy.

Even worse, in the present cases, instead of merely creating a federal common law action where there is no existing statute, this Court would be using an insufficiently definite international norm to overturn existing statutes.

II. REFERRING TO NON-BINDING TREATY PROVISIONS OR AN INSUFFICIENTLY DEFINITE INTERNATIONAL NORM AS A BASIS FOR DETERMINING WHETHER FLORIDA'S SENTENCING OF JUVENILES TO LIFE WITHOUT PAROLE VIOLATES THE EIGHTH AMENDMENT WILL CREATE UNCERTAINTY ABOUT A MULTITUDE OF U.S. DOMESTIC LAWS

The Court has made it clear that "the determination of whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that norm available to litigants in the federal courts." *Sosa*, at 732-33 (footnote omitted). Likewise, the determination of whether a non-binding international treaty provision or customary international law norm is sufficiently

definite to be referred to by this Court as a basis for overturning a majority of state and Federal juvenile life without parole sentencing laws must involve an element of judgment about the practical consequences of recognizing the norm for that purpose.

By referring to a non-binding treaty provision or an insufficiently definite international norm as a basis for interpreting the Eighth Amendment and overturning a majority of state and Federal juvenile life without parole sentencing laws, this Court would create a great deal of uncertainty about many U.S. domestic laws involving human rights. Many international human rights treaties contain general, undefined aspirations, not specific, detailed obligations. The language of such treaties is far less precise than the language that any State party would contemplate using to draft a statute.

> Parties in the past often drafted customary international law outputs without an understanding or expectation that it could create legally enforceable standards. Yet NGOs can now use broad aspirational commitments as a means of imposing legal duties. Second, unless and until adversely affected individuals become aware of potential liabilities, NGOs can continue to lobby for broad customary law outputs.

Kochan 2004, 275.

This is why, unless two-thirds of the U.S. Senate gives its consent to ratification of a treaty with the necessary reservations, understandings, and declarations, it does not become binding on the United States. Also, unless a treaty is self-executing, additional implementing legislation passed by Con-

gress and signed by the President is required to make the treaty provisions actionable at law.

For instance, the CRC, a treaty that has not even been considered for advice and consent by the U.S. Senate, covers a wide range of issues relating to purported civil, political, economic, social and cultural rights of children.

The rights listed in the CRC include, but are not limited to: the right to life; the right to preserve one's identity, including nationality; the right to leave one's own country and to enter another country for the purpose of being reunited with one's parents; the right to freely express one's views and the opportunity to be heard in judicial or administrative proceedings; the right to expression, including the freedom to seek, receive and impart information and ideas of all kinds, "regardless of frontiers;" the right to freedom of thought, conscience, and religion; the right to freedom of association and assembly; the right to privacy; the right to access to information and material from "a diversity of national and international sources;" the right to adoption; the right to a safe family environment; the right to enjoy the highest attainable standard of health; the right to an adequate standard of living; the right to education; the right to practice one's own religion and use one's own language; the right to rest, leisure, and play; the right to be protected from economic exploitation; the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment; and the right not to suffer capital punishment or life imprisonment without possibility of release.

If this Court refers to Article 37(a) of the CRC to support its decision to overturn the juvenile sentencing laws of Florida and over 40 other U.S.

states, in subsequent cases, will this Court overturn federal restrictions on immigration by reference to a child's right under the CRC to leave his or her country and enter another country to be reunited with his or her parents? Require the teaching of comparative religion in public schools by reference to the right under the CRC to seek and receive information and ideas of all kinds? Overturn state laws requiring a minor to secure parental consent prior to having an abortion by reference to the CRC's right to privacy for children? Overturn state bans on the adoption of children by same-sex couples by reference to the CRC's right to adoption? Mandate the unlimited provision of government-funded health care to all children by reference to the CRC's right to health care? Require state and local governments to increase their spending on public schools by reference to the CRC's right to education? Require public schools to educate children in their native languages by reference to the CRC's requirement that children be permitted to use their own language?

Although the terms of the CRC do not authorize them to do so, the 18 independent expert members of the Committee on the Rights of the Child interpret provisions of the CRC and publish non-binding General Comments suggesting the substance of the various rights. The areas covered by the Committee's published General Comments include, but are not limited to, the aims of education; HIV/AIDS and the rights of the child; adolescent health; implementing child's rights in early childhood; the right of the child to protection from corporal punishment and other "degrading" forms of punishment; the rights of children with disabilities; children's rights in juvenile justice; the rights of indigenous children; and the right of the child to be heard.

The General Comments are derived in part from the Committee's observations and conclusions made in connection with the reports that States parties to the CRC must file with the Committee every five years. Based on documentation submitted by relevant United Nations bodies and specialized agencies and non-governmental organizations that are familiar with children's rights issues in the country under review, a Committee working group determines the most important issues to be discussed with the representatives of the States. During their regular sessions, the Committee examines the State reports together with government representatives. The Committee then publishes its concerns and recommendations in "concluding observations," in which it sets out whether or not the reporting State was acting in conformity with its treaty obligations. The reporting State may provide a response to the Committee's concluding observations. In the State's report five years later, the Committee expects the reporting State to provide follow-up information regarding the problems highlighted in the previous concluding observations.

Thus, between the list of rights contained in the provisions of the CRC, the General Comments promulgated by the Committee, and the Committee's concluding observations on States' reports, there is a significant body of human rights resource materials to which this Court could arguably refer to as a basis for its decisions to overturn U.S. laws and policies relating to children's rights. But should it?

"Some claim that problems arise when treaties create institutions in which unelected officials in conjunction with other actors may create new obligations, which, at the time the treaty was signed, were

impossible to foresee." Kumm 14. At the time that the CRC was adopted in 1989, was it foreseeable that the 18 international experts of what was only intended to be a technical monitoring committee would examine the substance of the CRC's provisions; interpret them (with the assistance of unelected and unaccountable United Nations officials and representatives of non-governmental organizations); publish regulation-like General Comments defining the scope of the rights and explaining the manner in which States parties should implement them; audit the domestic laws and policies of States parties every five years to determine whether they are in "compliance;" publish a concluding report with observations about the status of children's rights in the country; encourage non-governmental organizations to use that report to shame even the most progressive governments into funding the immediate realization of every right of the child imaginable; and embark on a systemic campaign to convince national, regional, and international court judges to cite the rights of the child and General Comments as authority for their decisions?

Unfortunately, the provisions of the CRC and the dictates of the Committee on the Rights of the Child are only two of the many "friends at the cocktail party" to which this Court might look if it intends to "globalize" the United States Constitution.[2] There are other international human rights treaties, institutions, and organizations that, with the CRC

---

[2] "Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993), Scalia, J. concurring in the judgment. See Kochan 2006, 542-546.

and the Committee, form a matrix of human rights governance networks to which the United States could become subject should this Court continue its recent practice of referring to the provisions of such treaties as a basis for its decisions. *See* Kelly.

The International Covenant on Economic, Social and Cultural Rights ("ICESCR"), to which the United States is not a party, contains many established, emerging, and undefined norms that, if recognized by the Court, would impact existing U.S. domestic laws and policies, including, but not limited to, purported norms such as: the right to work; the right to fair wages; the right to join a union; the right to social security; the right to an adequate standard of living, including food, clothing and housing; the right to the highest attainable standard of physical and mental health; the right to education; and the right to the benefits of scientific progress. In addition, the Committee on Economic, Social and Cultural Rights has promulgated a General Comment setting forth the nature and scope of a right to water, though such a right is not expressly contained in the ICESCR.

The Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), to which the United States is not a party, contains many worthy, though broad, open-ended, and undefined, aspirations regarding the rights of women that, if recognized and enforced by the Court, would directly impact existing U.S. domestic laws and policies. These include, but are not limited to: that the principle of the equality of men and women be embodied in national constitutions or other appropriate legislation; that States take all appropriate measures to ensure the full development and advancement of women, including legislation, in all fields, in partic-

ular the political, social, economic and cultural fields; that States take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to eliminating prejudices, customary practices, and stereotypes regarding men and women; and that States take all appropriate measures to ensure that there is no discrimination against women and equality between men and women in the fields of political life and public service (both domestic and international), education, and employment, health care, and all other areas of economic and social life.

For the express purpose of considering the progress made in the implementation of CEDAW, the treaty provided for the creation of the Committee on the Elimination of Discrimination against Women (the "CEDAW Committee"). As has been the case with all human rights treaty bodies, the CEDAW Committee has morphed into a quasi-rule making body, which has produced 26 General Recommendations against which the performance of States parties on domestic laws and policies involving women's rights is measured to determine compliance with CEDAW. States parties to CEDAW are required to report to the CEDAW Committee on measures that they have taken to implement the provisions of CEDAW into their domestic laws and policies. The CEDAW Committee produces a final report in which, after commending the State party for whatever positive steps it has taken in regards to CEDAW, the experts on the CEDAW Committee detail the various ways in which the State party is failing to honor the CEDAW provisions. Non-governmental organizations, who assist the CEDAW Committee members with their investigation of the State party and who submit "shadow" reports detailing alleged shortcomings of

the State party, are able to use the CEDAW Committee's final report to publicly shame the State party and raise money for the NGO's next foray into the building of customary international law. International Women's Rights Action Watch 1. This enables NGOs to avoid messy, and often unsuccessful, attempts to influence constitutional and legislative changes at the state and national level through democratic means.

Of course, in the eyes of some NGOs, to have the Court conveniently reference a human rights treaty (*any* such treaty) as a basis for one of its decisions is a victory of incalculable value, regardless of whether the United States is a party to the treaty.

> NGOs, like other entities, act as interest groups focused on maximizing private benefits. In seeking the production of customary international law outputs for use in future litigation, NGOs will not necessarily be seeking specific outcomes from each output; but rather, these outputs can result in the production of tools for use in other forums.

Kochan 2004, 263.

The reporting processes relating to two international human rights treaties to which the United States is a party evidence the manner in which treaty body committees and NGOs partner to influence U.S. civil and human rights laws and policies outside the regular channels for democratic participation. These two treaties are the International Convention on the Elimination of all Forms of Racial Discrimination ("ICERD") and the ICCPR.

The Committee on the Elimination of Racial Discrimination ("CERD") is responsible for receiving

and considering periodic State party reports under ICERD. In its February 2008 report regarding the United States, the CERD set forth a list of recommendations that, if adopted or otherwise recognized by the Court, would result in the *de facto* transfer to the CERD of supervisory authority over state and federal responsibilities and measures for addressing racial discrimination in both public and private settings.

In its 2008 report, the CERD recommended that the United States: change its definition of racial discrimination used in federal and state legislation to include indirect, or *de facto*, discrimination; broaden the protection afforded by the law against discriminatory acts by private individuals, groups or organizations; establish an independent human rights institution; strengthen its efforts to combat racial profiling and adopt federal legislation to that end; not discriminate against non-citizens, particularly in the fight against terrorism; adopt and implement federal and state legislation to combat discrimination in housing; enact legislation to enable school districts to promote school integration; prohibit the expression of all ideas based upon racial superiority or hatred; design and implement strategies for the elimination of structural racial discrimination in the criminal justice system; discontinue the sentencing of juveniles to life without parole; allocate sufficient resources to provide for the legal representation of indigent persons; adopt all necessary measures, including a moratorium, to ensure that the death penalty is not imposed as a result of racial bias on the part of prosecutors, judges, juries, and lawyers; report to the CERD on the results of measures taken to prevent and punish violence and abuse against women belonging to minorities; automatically restore the

right to vote of those who have completed criminal sentences; explore ways to hold transnational corporations registered in the United States accountable for negatively impacting the rights of indigenous peoples outside the United States; report to the CERD on the results of measures taken to remedy obstacles that prevent or limit the access of minorities to adequate health care; continue to address racial disparities in sexual and reproductive health, including access to adequate contraception and family planning; and adopt all appropriate measures to reduce the persistent "achievement gap" between minority and white students in education. *See* Groves.

Meanwhile, the human rights regime under the ICCPR has resulted in an unwarranted and unauthorized intrusion into United States domestic and foreign policy. In its December 2006 concluding observations regarding the United States, the ICCPR's Human Rights Committee ("HRC") requested the United States to provide information and take action regarding a number of issues. Most of the HRC's requests for follow-up information concerned matters outside the territory of the United States, even though the ICCPR explicitly does not apply outside the territory of a State party. Nevertheless, the Government of the United States submitted comments to the HRC addressing the matters raised in the HRC's concluding observations, primarily matters relating to the United States' engagement in an armed conflict with al Qaida, the Taliban, and their supporters.

The HRC's investigation of matters outside the territory of the United States, involving armed conflict with terrorists, provides compelling evidence in support of the U.S. Senate's wisdom in having rati-

fied the ICCPR with five reservations, five understandings, and four declarations, and in having not ratified other international human rights conventions. Fortuitously, the United States declared that the provisions of Articles 1 through 27 of the ICCPR are not self-executing, thereby enabling the citizens of the United States and their elected officials to respond to the unforeseeable war against global terrorism within the confines of the United States Constitution and duly enacted federal legislation, and without the interference of unelected and unaccountable international committees.

In sum, by referencing Article 37(a) of the Convention on the Rights of the Child or provisions of other international human rights treaties as a basis for its decision in these cases, this Court would be undermining the ability of the United States to govern its internal affairs democratically, without the involvement of unelected and unaccountable "experts" working with United Nations treaty body committees in Geneva. When, at any time, a majority of the Justices of this Court can refer to a provision of a non-binding international human rights treaty or an insufficiently definite international norm and thereby end all state and national democratic discourse, deliberation, and decision-making in regards to ultimate questions of civil, political, economic, social, and cultural rights, the democratic process and the rule of law are in great jeopardy.

III. CONCLUSION

For the foregoing reasons, this Court should affirm the judgments of the Florida First District Court of Appeal.

Respectfully submitted,

STEVEN GROVES
THE SOVEREIGNTY NETWORK
915 E St NW
Washington, DC 20004

JAMES P. KELLY, III*
SOLIDARITY CENTER FOR LAW AND JUSTICE, P.C.
Five Concourse Parkway
Suite 200
Atlanta, Georgia 30328
(678) 231-1209

* *Counsel of Record*

Counsel for Amici Curiae

APPENDIX

APPENDIX

Interests of *Amici*

Americans United for Life is a nonprofit, public-interest law and policy organization whose vision is a nation in which everyone is welcomed in life and protected in law. The first national pro-life organization in America, AUL has been committed to defending human life through vigorous judicial, legislative, and educational efforts state by state since 1971. **William L. Saunders** is Senior Vice President of AUL.

Catholic Family and Human Rights Institute is a New York and Washington DC-based research institute concerned with international social policy, particularly in the areas of life and family issues. While C-FAM is agnostic on the underlying issue of juvenile sentencing, C-FAM is deeply concerned with the threat to democratic institutions that comes through the misuse of international treaties in the creation of supposedly new international norms such as is happening with the case under review here. **Austin Ruse** is the President of C-FAM.

Center for Security Policy specializes in identifying policies, actions, and resource needs that are vital to American security. A fundamental precondition for the exercise of national power, of course, is the maintenance of U.S. control over the decision-making process—in short, sovereignty. The Center's Sovereignty Project seeks to revitalize the determination of American leaders to develop policies free from undue international influence and to prevent the establishment of global government. **Frank J. Gaffney, Jr.** is the President and CEO of the Center for Security Policy.

Concerned Women for America is a non-profit public policy organization representing 500,000 people nationwide. One of its core issues is to protect America's sovereignty from the unconstitutional application of international law, treaties or norms. **Wendy Wright** is President of CWA.

Family Advocacy International is a non-profit organization with substantial experience in protecting and promoting the family as the fundamental unit of society in the United Nations and related international venues. **E. Douglas Clark** is the President of FAI.

Family Watch International was founded in 1999 and is a nonprofit, international organization with members and supporters in over 100 countries. Its mission is to preserve and promote the family, based on marriage between a man and a woman as the societal unit that provides the best outcome for men, women and children. FWI works at the United Nations and in countries around the world educating the public and policymakers regarding the central role of the family and advocating for women, children and families at the international, national, and local level. **Sharon Slater** is the President of FWI.

Freedom Alliance is a non-profit educational and charitable foundation founded in 1990 by Lt. Col Oliver L. North, who now serves as the organization's honorary chairman. Its mission is to advance the American heritage of freedom by honoring and encouraging military service, defending the sovereignty of the United States and promoting a strong national defense. **Thomas P. Kilgannon** is the President of Freedom Alliance.

Hudson Institute is a non-partisan policy research organization dedicated to innovative research and analysis that promotes global security, prosperity, and freedom. The Institute challenges conventional thinking and helps manage strategic transitions to the future through interdisciplinary and collaborative studies in defense, international relations, economics, culture, science, technology, and law. Through publications, conferences and policy recommendations, we seek to guide global leaders in government and business. **Herbert I. London** is President and **John Fonte** is a Senior Fellow at Hudson.

Solidarity Center for Law and Justice is a professional corporation organized under the laws of the State of Georgia for the promotion of social welfare by defending human rights secured by law, to wit: those individual liberties, freedoms, and privileges involving human dignity that are either specifically guaranteed by the U.S. Constitution or by a special statutory provision coming directly within the scope of the 13th or 14th Amendment, some other comparable constitutional provision, or that otherwise fall within the protection of the Constitution by reason of their long established recognition at the common law as rights that are essential to the orderly pursuit of happiness by free men and women. When permitted by court rules and practice, Solidarity Center for Law and Justice files briefs as amicus curiae in litigation of importance to the protection of human rights.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in

1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual Cato Supreme Court Review, and files amicus briefs with the courts. Cato's interest in this particular case lies not in the underlying criminal law issues but in that it could be used as a vehicle for improperly inserting foreign and international law—and non-binding aspirations—into domestic constitutional (and statutory) interpretation. **Ilya Shapiro** is a senior fellow in constitutional studies at Cato and editor-in-chief of the *Cato Supreme Court* Review.

The Competitive Enterprise Institute is a public interest group dedicated to free enterprise and limited government. In its view, the use of vague international norms to interpret constitutional provisions poses grave dangers to liberty. **Christopher C. Horner** is a Senior Fellow at CEI.

The Sovereignty Network was organized to formulate proper courses of action in response to U.S. government policies, federal legislation, and actions of the United Nations system which erode or otherwise impinge on American sovereignty, and takes concerted action to strengthen American independence and self-government by opposing global governance and transnational progressivism. The Network is an association of analysts, activists, and academics based in Washington, DC.

United Families International is a non-profit, non-partisan, non-religious international organization founded in 1979. It is devoted to maintaining and strengthening the family. UFI strengthens the family by respecting existing law, political structure,

religion and cultural norms that preserve the family. Apropos to the present cases, UFI strengthens the family by promoting respect for the sovereign rights of each individual nation as it works in the world community to protect the common good of individual families. **Michael Duff** is the President of UFI.